

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
2 FOR THE COUNTY OF MULTNOMAH  
3

4 THE ESTATE OF MICHELLE )  
SCHWARZ, deceased, by and )  
5 through her Personal )  
Representative, RICHARD )  
6 SCHWARZ, )  
)  
7 Plaintiff, ) Circuit Court  
) Case No. 0002-01376  
8 vs. )  
)  
9 PHILIP MORRIS INCORPORATED, ) Appellate Case  
a foreign corporation, and ) No. A118589  
10 ROTH'S I.G.A. FOODLINER, )  
INCORPORATED, an Oregon )  
11 corporation, )  
Defendant. )

12  
TRANSCRIPT OF PROCEEDINGS  
13 Volume 37-B  
10:45 a.m. - 3:00 p.m.  
14

15 BE IT REMEMBERED, That the above-entitled  
16 matter came on regularly for Jury Trial and was  
17 heard before the Honorable Roosevelt Robinson, Judge  
18 of the Circuit Court of the County of Multnomah,  
19 State of Oregon, commencing at 10:45 a.m., Monday,  
20 March 4, 2002.

21 \* \* \*  
22 Katie Bradford, CSR 90-0148  
Official Court Reporter  
23 210-A Multnomah County Courthouse  
1021 SW Fourth Avenue  
24 Portland, Oregon 97204  
(503) 988-3549  
25

## 1 APPEARANCES:

2 Mr. D. Lawrence Wobbrock, Attorney at Law,  
3 Mr. Charles S. Tauman, Attorney at Law,  
4 Mr. Richard A. Lane, Attorney at Law,  
5 Appearing on behalf of the Plaintiff;

6 Mr. James L. Dumas, Attorney at Law,  
7 Mr. John W. Phillips, Attorney at Law,  
8 Appearing on behalf of Defendant  
9 Philip Morris, Incorporated and Defendant  
10 Roths I.G.A. Foodliner, Incorporated.

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(Monday, March 4, 2002, 10:45 a.m.)

P R O C E E D I N G S

(Court Reporter Jennifer Wiles reported  
Volume 37-A.)

(Whereupon, the following proceedings were  
held in open court, out of the presence of the  
jury:)

THE CLERK: Please remain seated. Court  
is in session.

THE COURT: Be with you in moment.

All right. Counsel, what the Court did,  
the Court reviewed the case of State v. Lerch, 296  
Or. 377, a 1984 case. The murder case, the body was  
never found. The defendant was convicted of  
committing the murder. A lay witness was allowed to  
testify about the odor that they smelled coming from  
the dumpster.

His experience was that he'd worked in the  
fish industry with his father all his life, and he'd  
been in the military for 13 years and had smelled  
decomposing bodies. The defendant also contends  
that if Jaha's (ph) opinion were rationally based,  
it is not proper lay opinion under OEC 701. He  
states that this is really expert opinion  
masquerading as lay opinion. And the Court said,

1 "As has been previously pointed out, the same matter  
2 may be the subject of both lay and expert opinion."

3 And also Oregon law under 701 has changed  
4 or clarified. The older cases suggested that an  
5 opinion of a lay witness is only admissible if it is  
6 necessary rather than merely helpful; however, the  
7 Supreme Court has more recently suggested in court  
8 to non-expert opinions that allowed the trial judge  
9 more leeway, corresponding to the standard of  
10 helpfulness adopted by this subsection.

11 The Court would find that this testimony  
12 would be helpful and she has the background to give  
13 it. I am not going to allow the defense to turn her  
14 into an expert witness, but some opinions in the  
15 area of marketing would be allowed as a lay witness  
16 is the Court's ruling.

17 MR. DUMAS: Thank you, Your Honor.

18 MR. TAUMAN: Thank you, Your Honor.

19 THE COURT: Bring the jury, please.

20 (The following proceedings were held in  
21 open court, the jury being present at 10:55 a.m.:)

22 THE COURT: All right. Mr. Dumas, you may  
23 proceed with your questions.

24 MR. DUMAS: Thank you, Your Honor.  
25

NANCY LUND

Was thereupon called as a witness on behalf of the Defendant, and, having been first duly sworn, was examined and testified as follows:

## FURTHER DIRECT EXAMINATION

BY MR. DUMAS:

Q To restate where we were before the break, Ms. Lund, we were talking about how marketers like yourself use consumer input in making decisions, okay?

A Yes.

Q My question to you, Ms. Lund, is based on your experience, who is in the driver's seat, consumers or advertisers?

A Well, I think the consumers -- sorry, I think the consumers are in the driver's seat. They put their money down every single day making their choices about what it is they want to buy. They know what they want to buy. They work hard for their money, so I believe the consumer is in the driver seat and he votes every day.

Q And as the Court indicated to you, you do have a bit of a soft voice, Ms. Lund.

A I am trying.

1           Q     You can pull the microphone toward you.  
2     It's movable.  
3           A     Is that okay?  
4           Q     Just try and speak up, please.  
5           A     All right.  
6           Q     Now, I want to redirect your attention. I  
7     want to talk to you about Benson & Hedges cigarettes.  
8     And I think where we were in term the of your career  
9     was that you are still at Wells, Rich, correct?  
10          A     That's correct.  
11          Q     And after you worked on the Players  
12     cigarette campaign, did you work on another Philip  
13     Morris campaign?  
14          A     Yes, I did. I worked on Benson & Hedges.  
15          Q     About how long had you worked on the  
16     Players cigarette?  
17          A     About a year or a year and a half,  
18     something like that.  
19          Q     When you worked on Benson & Hedges, what  
20     position did you have at Wells, Rich?  
21          A     I was an account supervisor when I worked  
22     on Benson & Hedges.  
23          Q     Is that different than an account  
24     representative?  
25          A     They're all kind of the same thing.

1 Q And how did it come about that you became  
2 involved in Benson & Hedges?

3 A Well, Benson & Hedges was a Philip Morris  
4 brand, and we had launched Players cigarettes, and  
5 Wells, Rich & Greene was responsible for developing  
6 the advertising for Benson & Hedges, and they needed  
7 an account supervisor on Benson & Hedges, and they  
8 chose me.

9 Q When you were given that assignment,  
10 did you go through a process of becoming familiar with  
11 the history of Benson & Hedges, the cigarette brand,  
12 and the history of previous marketing and advertising  
13 efforts on behalf of that brand?

14 A Oh, I sure did.

15 Q Why did you do that?

16 A Well, I think that when one is trying to  
17 market a brand or advertise a brand, you like to look  
18 back and you like to see what happened in the history  
19 and learn everything you can about how successful the  
20 brand was or wasn't, and what the competitors were  
21 doing at the time, all of those things. To try to  
22 really be able to go forward, it's important to look  
23 back.

24 Q And what kinds of things or materials did  
25 you review when you were at Wells, Rich concerning



1 Benson & Hedges?

2 A Well, I looked at its advertising, I  
3 looked at kind of the way it marketed its products.  
4 You know, we were at Wells, Rich & Greene, and we  
5 could from time to time could see the marketing plans,  
6 for example, that Philip Morris would generate. We  
7 would help them generate those kinds of things.

8 Q And you've selected some Benson & Hedges  
9 advertisements that you think would be helpful to the  
10 jury in explaining that advertising campaign?

11 A Yes, I sure have.

12 Q Okay. Before we get there, though, why  
13 don't you put all that in context. Why don't you give  
14 us a brief kind of history lesson about  
15 Benson & Hedges.

16 A Okay. Philip Morris didn't own  
17 Benson & Hedges in the early 1950s. It was called the  
18 Benson & Hedges Company. And Philip Morris bought  
19 Benson & Hedges some time in the early 1950s. And it  
20 was kind of a very English cigarette, a premium  
21 cigarette. It was in a flat package, kind of -- not  
22 like a tall, thin package like we have today, but a  
23 flat package and had ten cigarettes on the top and ten  
24 cigarettes on the bottom, and a very kind of scripty  
25 kind of Benson & Hedges written on it.

1 Q Was it a big brand or a little brand or  
2 something in between?

3 A I would say it was a little brand.

4 MR. DUMAS: All right. With regard to  
5 Benson & Hedges advertisements, demonstrative  
6 numbers -- exhibit numbers for purpose of  
7 demonstrative, 2, 3, 4 and 5. Any objection?

8 MR. TAUMAN: No objection.

9 BY MR. DUMAS:

10 Q I want to show you some Benson & Hedges  
11 ads that I understand ran from about 1960 to 1964. I  
12 will -- before we get into the text of these ads, I  
13 can represent to you that this jury has heard evidence  
14 that Michelle Schwarz began smoking Benson & Hedges  
15 cigarettes in 1964, when she was 18 years of age.  
16 Okay?

17 A Okay.

18 Q And what I'd like to do is review the  
19 Benson & Hedges advertising that occurred about that  
20 time. We're going to start about four years before  
21 Michelle Schwarz began smoking. Okay?

22 A Okay.

23 Q All right. What are we looking at here on  
24 demonstrative No. 2, Ms. Lund?

25 A Well, it was an ad for Benson & Hedges

1 that ran. It says, "Make this important discovery:  
2 With Benson & Hedges, you pay more, you get more."  
3 You know when I said to you before that it was a  
4 premium cigarette? You actually paid more for this  
5 kind of English cigarette, and that's what this  
6 campaign was about.

7 Q And it's got a picture of a big microscope  
8 there?

9 A Yes.

10 Q What's the point of that?

11 A Well, I think it's playing off the word:  
12 "discovery." You know, you're going to discover this  
13 cigarette.

14 Q I'm showing another ad. What's this  
15 about, Ms. Lund?

16 A Well, it's part of the same campaign.  
17 This one shows -- I think it's a duck decoy. "What is  
18 the lure of Benson & Hedges? Well, you pay more and  
19 get more." It's the same idea. Discover this brand,  
20 it's a premium brand. You are going to pay more for  
21 it, but you are going to get more for it.

22 Q We're not going to spend the time to go  
23 through each and every word in the Benson & Hedges  
24 ads. We're going to offer all of these into evidence,  
25 and the jury will have a chance to examine them in

1 detail later. The next one you brought appears to be  
2 a golf setting; is that right?

3 A That's right. It says, "Where did you  
4 first meet Benson & Hedges?" You could meet at one of  
5 these golf clubs. "With Benson & Hedges, you pay  
6 more, you get more." It's all part of the same  
7 campaign.

8 Q A couple more, so the jury gets a good  
9 sense of what this campaign was about. What's this a  
10 picture of?

11 A Well, these are some kind of crests. I am  
12 not sure what they're crests of. It says, "Where did  
13 you first meet Benson & Hedges?" These crests are on  
14 the wall. "With Benson & Hedges, you pay more, you  
15 get more."

16 Q What is that background, Ms. Lund?

17 A It looks like a wall, a wooden-paneled  
18 wall.

19 Q Like a den maybe?

20 A Yeah, probably an office or den or  
21 something like that.

22 Q So in looking back at those ads, Ms. Lund,  
23 when you reviewed those in the mid-'80s, is that about  
24 right?

25 A That's correct. Early '80s, mid-'80s

1 that's right.

2 Q About mid-'80s, when you were working for  
3 Wells, Rich. What did you believe this campaign was  
4 all about, this 1960, 1964, Benson & Hedges campaign?

5 A Well --

6 MR. WOBBROCK: Your Honor, I have a  
7 question in aid of objection.

8 THE COURT: You may.

9

10 QUESTIONS IN AID OF OBJECTION

11

12 BY MR. WOBBROCK:

13 Q Ms. Lund, you were 12 years old at the  
14 time Michelle Schwarz began smoking in 1964; is that  
15 correct?

16 A That's correct.

17 Q So this is all opinion based upon no  
18 first-hand knowledge on your part, correct?

19 A I was 12 years old at that time, and I  
20 don't recall these ads from being 12 years old.

21 MR. WOBBROCK: Your Honor, again, this is  
22 expert opinion, not based upon personal perception.  
23 It is outside of scope of this witness's expertise  
24 at least as disclosed in the pretrial submissions in  
25 this case that we were all required to comply with.

1 MR. DUMAS: Your Honor, the Court has  
2 already ruled on this. I am asking --

3 THE COURT: Counsel, just take it easy.  
4 The Court understands the plaintiff's objection.  
5 The Court will allow them to have a continuing  
6 objection, but will overrule the objection.  
7 Proceed, please.

8 MR. DUMAS: Thank you, Judge.

9 BY MR. DUMAS:

10 Q Just so there is no confusion, Ms. Lund, I  
11 am not asking you about your interpretation of these  
12 ads when they were running between 1960 and 1964,  
13 okay?

14 A Yes.

15 Q I understand that you were 12 years old at  
16 that point in time, and you don't remember seeing  
17 these ads then; is that right?

18 A That's correct.

19 Q Okay. What I'm talking about is when you  
20 reviewed these ads in the mid-'80s as an advertising  
21 executive at Wells, Rich, okay?

22 A Right.

23 Q It was part of your review process because  
24 you were going to become involved in the  
25 Benson & Hedges campaign; is that clear?

1 A That's clear.

2 Q What was this campaign about, the 1960,  
3 1964 Benson & Hedges campaign?

4 A This campaign is clearly about a cigarette  
5 that's a premium cigarette with a British heritage,  
6 Benson & Hedges is the name, and the script in the  
7 package. It is kind of like a gentlemen's club. You  
8 have the golfing, you have the duck decoys and crests,  
9 and it was really kind of "This is a premium  
10 cigarette."

11 Q You're familiar with the advertising  
12 history of Philip Morris?

13 A Yes, I am.

14 Q Realizing you weren't at Philip Morris  
15 from 1960 to 1964, when you made your investigation,  
16 your review of Benson & Hedges, Ms. Lund, were these  
17 advertisements that we just saw between 1960 and 1964,  
18 were they on television?

19 A No, these were print advertisements.

20 Q Between 1960 or 1964, did Benson & Hedges  
21 advertise on television?

22 A Not that I'm aware of.

23 Q When did Benson & Hedges first advertise  
24 on television, Ms. Lund?

25 A With the introduction of Benson & Hedges

1 100s in 1966.

2 Q Now, what happened to Benson & Hedges  
3 after this 1964 campaign that we've talked about?

4 A Well, the brand was small. And it wasn't  
5 really doing very well in the United States market and  
6 Philip Morris decided that it would make a longer  
7 version of the cigarette, 100 millimeter cigarette.  
8 So if this one has 85 millimeters you'd add  
9 15 millimeters to the cigarette. So smokers could  
10 have two, three, four, five puffs more for the  
11 cigarette, and pay the popular price for the cigarette  
12 in the United States market.

13 Q Is there a term in the business when that  
14 happens to a product?

15 A Yeah. I mean, it's probably called a line  
16 extension or repositioning of Benson & Hedges.

17 THE COURT: Could I see counsel in  
18 chambers briefly.

19 MR. DUMAS: In chambers?

20 THE COURT: No, no, right here.

21 (Sidebar conference between Court and  
22 counsel, off the record.)

23 THE COURT: All right, members of the  
24 jury, would you step out a moment? The Court has an  
25 issue that he wishes to discuss with counsel.



1 (The following proceedings were held in  
2 open court, out of the presence of the jury at  
3 10:55 a.m.):

4 THE COURT: All right counsel, the concern  
5 that I'm having as I'm sitting here listening to  
6 this witness's testimony, I'm getting a little  
7 concerned that we may be actually stepping into the  
8 area of expert testimony because the reason I'm  
9 saying, an expert witness you can take data and give  
10 to an expert witness.

11 An expert witness can take that data and  
12 draw opinions from that data. That's what an expert  
13 witness can do. A lay witness can't do that. A lay  
14 witness, I can't go to a lay witness and say, "Lay  
15 witness, take this data here and give me your  
16 opinion on it. The lay witnesses have to testify as  
17 to things within their own -- in their own  
18 knowledge, or their expertise. For example, in  
19 State v. Lerch, where this guy was testifying, he  
20 was testifying, "I was at the dumpster. I smelled  
21 the smell."

22 MR. DUMAS: Uh-huh.

23 THE COURT: "I think it was a decomposing  
24 body," so he is testifying not from data that  
25 somebody said, "Mr. Witness, I am holding up this

1 bottle. It's got a particular aroma to it. Smell  
2 it, terrible, terrible, what do you think it is?

3 "Well, you know, I think it is a rotten  
4 fish." That would be inappropriate for a lay  
5 witness. You can't give them extrinsic data and  
6 have them to draw an opinion from that extrinsic  
7 data. It has to be something of their own opinion.

8 And as this testimony is going on, I am  
9 saying, wait a minute, wait a minute. This witness  
10 is testifying about data that she was given or she  
11 reviewed in the '80s, and to give an opinion on that  
12 testimony, seems to be the same thing that you would  
13 do strictly to an expert witness, as opposed to,  
14 say, if this witness was 75 years old.

15 I am just picking a figure out. And this  
16 witness said, "Yes. At the time that Benson &  
17 Hedges was advertising this thing, I was sitting in  
18 front of my TV and I was looking at it." Now, she's  
19 testifying from her own experience, her own  
20 knowledge, and she can do that. But I don't think  
21 she can do it from the data that has been given to  
22 her.

23 That's what my concern is, and I think  
24 that's what the case law holds. And counsel,  
25 Mr. Dumas or Mr. Phillips, one of you gentlemen try

1 to take care of the Court's concern that I have at  
2 this point in time.

3 MR. DUMAS: Sure, Your Honor. I mean,  
4 this witness was a fact witness to events that  
5 occurred in 1985, reviewing documents at that time,  
6 reviewing ads at that time. She's not even giving  
7 opinions now, Judge. She's just saying, "Benson &  
8 Hedges was repositioned around 1966, and it became a  
9 longer cigarette. We then had this campaign, and  
10 the campaign says two, three, four extra puffs."

11 She is not giving opinions about anything.  
12 These are things that she became aware of back in  
13 1985, when she wasn't even working for Philip  
14 Morris. She is not giving expert opinion about  
15 anything, Your Honor.

16 THE COURT: I guess what I'm saying, I  
17 found what I was looking for. I was just talking  
18 and I couldn't find it. Under State v. Lerch, it  
19 said, "Any central difference between opinion  
20 testimony by a lay witness and an expert witness is  
21 that the lay witness is restricted to his personal  
22 perceptions by the expert witness, may testify from  
23 facts made known to him at or before the hearing."

24 "Facts made known to him." You can take  
25 an expert witness and just give some facts to that

1 expert witness and say, "Ms. Expert Witness, what do  
2 you think?" And they can take off. I don't think  
3 you can do that to a lay witness.

4 What I'm saying, I think that when we look  
5 at personal perceptions, I don't think those  
6 personal perceptions can be made up from data that  
7 the lay witness is observing. It would have to be  
8 something like, they're standing on the street  
9 corner, and the car go zooming back, crash. I think  
10 that that car was going faster than the speed limit.  
11 That is a personal perception, what that witness is  
12 saying.

13 But it would be inappropriate to give that  
14 witness a police report and say, "Based upon your  
15 review of this police report, how fast do you think  
16 that car was going?"

17 "Oh, I read the police report and I think  
18 the car was going faster than the speed limit."  
19 That would be inappropriate. So I think you might  
20 be running into the same problem when saying, "I  
21 reviewed documents -- in the '80s, I reviewed  
22 documents from the '60s, and from those review of  
23 those documents, now I believe."

24 To me it seems to be the same thing,  
25 counsel, that you're using the witness as an expert

1 witnesses when you do that.

2 MR. DUMAS: Two responses, Your Honor.

3 The documents weren't provided to her in a capacity  
4 of being a witness to anything as an expert witness  
5 in trial. The documents that she reviewed, she did  
6 in the ordinary course of her job. That's the first  
7 thing. She's a fact witness to what occurred in the  
8 '80s. That's my first response.

9 And the second response is, Judge, she is  
10 testifying to as to facts, that Benson & Hedges was  
11 not advertised on television between 1960 and 1964,  
12 Benson & Hedges was repositioned in 1966, and  
13 15 millimeters was added to it. And now she is  
14 going to talk about the television campaign and the  
15 advertising, that's fact, here's what they did and  
16 hears what they showed the American people between  
17 1967 and 1971.

18 She is just telling a story, a factual  
19 story. I am not going to have her interpret that or  
20 give opinions about what it means or it doesn't  
21 mean.

22 THE COURT: Counsel, let me ask you a very  
23 tough question.

24 MR. DUMAS: You always do, Judge.

25 THE COURT: Since you laid that out for

1 the Court. Certainly, it's a fact when the witness  
2 testifies that Benson & Hedges advertising on  
3 television didn't start until 1966. Fact. Very  
4 good, I like that. But when you show her a picture  
5 of the Benson & Hedges advertising and say, "What is  
6 that advertising saying?" That is not a fact.  
7 That's her opinion when she said, "I look at the  
8 duck -- I look at the duck, this duck was hidden  
9 somewhere. Help me out.  
10 MR. DUMAS: The decoy.  
11 MR. PHILLIPS: In the marsh.  
12 THE COURT: In the blind. What is it?  
13 MR. PHILLIPS: Decoy.  
14 MR. WOBBROCK: The reeds or in the bushes.  
15 THE COURT: The decoy in the bushes gives  
16 you that. Let me see this thing. That seems to me  
17 like you get into an opinion. To say that, "We did  
18 this in 1964," or whatever, that's a fact. And  
19 there is no problem with that. But to say, "Now,  
20 what does looking at that duck and the decoy in the  
21 bushes, what did it say to you?  
22 "That says to me, in my opinion, the duck  
23 and the decoy in the bushes means this." The same  
24 thing you asked also about the microscope. "When  
25 you look at the microscope and the Benson & Hedges,

1           what is that saying to you?

2                    "That's saying you are looking for  
3           discovery." That's an opinion. Some people look  
4           through a microscope for other reasons than  
5           discovery. Sometimes they just want to illuminate  
6           the issue that they already know. And what was the  
7           other one? There was three of them, I think. What  
8           was the other one? The duck, the microscope, and  
9           what was the other one?

10                   MR. WOBBROCK: The golf club and the yacht  
11           club.

12                   THE COURT: The golf club and the yacht  
13           club. Those issues, when you pull out what those  
14           things are saying, that appears to the Court that  
15           you actually stepping into opinion in those areas  
16           right there. When we start advertising, when we  
17           went on TV, when we put these on, these was not on  
18           television, those are fact situations. I think she  
19           can go back and testify to those fact situations.

20                   But I am going to have to limit it,  
21           though, in getting into what those things envision.  
22           I think you'd have to have an expert witness to talk  
23           about what they actually -- what they are actually  
24           saying to me. You know, I look at this fine club  
25           here, and certainly I would need an expert to tell

1 me what that is saying, because I certainly can't  
2 look at it. It doesn't speak to me, but it speaks  
3 to an expert. And an expert can tell me what it's  
4 saying.

5 I think I am going to limit you,  
6 Mr. Dumas, to limiting your questions to fact  
7 situations with this witness, and not where you go  
8 in and actually get an opinion. These special  
9 things that are not in her specific expertise. Now,  
10 when you get on up into her work, that is different.  
11 This kind of data and this type of information, I  
12 think it violates the distinction between the expert  
13 witness and lay witness restriction to his or her  
14 personal perception.

15 MR. DUMAS: Well, Your Honor, this witness  
16 did have personal perception of these ads. This  
17 witness does have a lay opinion about those ads.  
18 This witness' lay opinion about those ads will be  
19 helpful to this fact finder in drawing conclusion  
20 about whether Michelle Schwarz was influenced by the  
21 friendly familiarity of Benson & Hedges ads, which  
22 is what this case is partly about.

23 THE COURT: I only heard that wonderful  
24 term about friendly familiarity from an expert  
25 witness. I don't think I'd let a lay witness get



1       into that nebulous penumbra of marketing technology.  
2               MR. DUMAS: I wasn't intending and I'm not  
3 going to ask this witness whether in her opinion  
4 this was a friendly familiarity, okay? But I think  
5 I am entitled to have this witness tell a story of  
6 her familiarity and her work with Benson & Hedges,  
7 and how she took her understanding of the previous  
8 ads in 1960, and 1964, and as she used them as  
9 factual matters in her involvement with Benson &  
10 Hedges in the ads in 1980.

11               THE COURT: I will allow you to do it as  
12 long as you stick to the factual matters. The Court  
13 is ruling when you ask her opinion of what the ads  
14 are saying, that steps into the arena of expert  
15 testimony and the Court will not allow it.

16               MR. DUMAS: So it's the Court's ruling I  
17 cannot ask this witness her opinions about anything?

18               THE COURT: No, I didn't say that.

19               MR. DUMAS: Okay. I just want to be sure  
20 I clearly understand, Your Honor.

21               THE COURT: I didn't say that. She can  
22 give testimony relating to her personal perceptions.  
23 But she can't give testimony as to data that was  
24 presented to her and she drew an opinion from that  
25 data, unless it's a fact question that she can. She

1 reviewed the documents and Benson & Hedges bought TV  
2 advertising in 1966. That's a fact, she can testify  
3 to that. But now you said, "But in your opinion --  
4 in your opinion," then if you want to have some  
5 opinion about the advertising, you see, "In your  
6 opinion, did that advertising in 1966 create a mad  
7 rush of consumers to the marketplace to snap up all  
8 of the Benson & Hedges cigarettes off the store  
9 shelves?"

10 I don't think you can ask her that  
11 question because then you're getting into the expert  
12 arena of that. But the fact that they were  
13 advertising, you can get into that fact.

14 MR. DUMAS: And I'm not asking her that,  
15 but I can ask her, "What are these ads about?" I am  
16 not asking her to draw opinions about whether they  
17 created friendly familiarity or not. What's the  
18 character of the ads?

19 MR. PHILLIPS: Can I weigh in here,  
20 Your Honor?

21 THE COURT: I think that still kind of  
22 opinion, counsel, because character is in the eye of  
23 the beholder. If we put three different expert  
24 witnesses up here and three fact witnesses, those  
25 ads might say a different thing to each one of those

1 witnesses in their opinion.

2 Counsel.

3 MR. PHILLIPS: Your Honor, let me sort of  
4 repeat what I think I've heard you say so far, and  
5 then try to persuade you that you should change your  
6 opinion.

7 THE WITNESS: All right. Proceed,  
8 counsel, and give it a shot.

9 MR. PHILLIPS: What you said is that prior  
10 to when she actually starts putting the message into  
11 the ads herself in '85, when she was looking back.  
12 Let's assume that this was an 1985, and she is doing  
13 it in 1985, Benson & Hedges. As a marketer, she's  
14 obviously trying to figure out, well, what's the  
15 message that I want to convey in the ads? What I  
16 read from Your Honor's testimony -- rulings, excuse  
17 me. I am a little loose at the lip this morning, I  
18 apologize.

19 Your Honor is ruling thus far that she  
20 could testify from her personal experience about  
21 what the intent of the ad campaign that she was  
22 doing at that time.

23 THE COURT: That's correct.

24 MR. PHILLIPS: Your concern is when she  
25 looks back, and when she starts working on the

1 Benson & Hedges' file, and she looks back and tries  
2 to look at what the history of the brand was, and so  
3 forth, that that from your perspective looks more  
4 like looking at data and extrapolating from it in a  
5 way that an expert does.

6 And that's the concern you've got. And  
7 what I would like to suggest to you is that a lot of  
8 Ms. Lund's testimony hasn't come out yet regarding  
9 how she does her work, but it will come out. And  
10 what a marketer does, what a marketer's expertise is  
11 in their job, not as an expert but what their  
12 experience is, what they do is to figure out what is  
13 the message that we want to convey to connect with  
14 our consumers with this particular ad campaign.

15 And what Mrs. Lund has been in the process  
16 of explaining, "I looked at it. In the early '60s,  
17 some of that is fact, there was no television  
18 advertising and so forth, but I also need to  
19 understand the history of the message in the ads at  
20 various points in time."

21 We heard this message. I don't think it  
22 takes a whole lot of expertise frankly to see what  
23 the message is. That's the message of this ad  
24 campaign. She is going to go on to another one.  
25 There's a message associated with that. That's her

1 work. That is, in fact, what she does for a living,  
2 to create and understand the message of her own  
3 client's products, and of her competitor's products.

4 For her to be able to say, "Well, the  
5 message there -- I understood that the message was  
6 this during the '60s and it got repositioned in the  
7 '70s and the message was this. And that's what I  
8 was dealing with when I was thinking about what I  
9 message should be for the product in 1985."

10 THE COURT: Counsel, let me ask you a  
11 question about what you just said about the  
12 marketing expert. This witness has tremendous  
13 experience in the arena of marketing; otherwise, she  
14 wouldn't be a vice president of marketing for Philip  
15 Morris. She has a lot of expertise in that.

16 But what is she going to tell me about  
17 R.J. Reynolds advertising. If you flip up on the  
18 board an advertising from R.J. Reynolds from 1966,  
19 and ask her what that advertising said, she needs to  
20 be an expert witness to do that. She can't do  
21 that -- she wants to speak to me and tell me what  
22 that is, and yet R.J. Reynolds might say, "No, no,  
23 no, no, we intended something else."

24 But if she is an expert witness regardless  
25 of what R.J. Reynolds is saying, she could say, "In

1 my opinion, I thought this ad said this." But she  
2 couldn't, as a lay witness say that about that  
3 document. Because about the same thing we have  
4 here, she's putting herself in the shoes of the  
5 early marketing people at PM USA, and saying, "This  
6 is what they were trying to say."

7 And I'm saying it takes an expert witness  
8 to do that with this information coming to you and  
9 you're reviewing that, and you were not there and  
10 don't have personal experience of what they were  
11 actually doing at the time. You were not in the  
12 shop, while they were putting this advertising  
13 program together.

14 MR. PHILLIPS: And what I'm trying to  
15 persuade you of is if this witness has had decades  
16 of experience in terms of creating the message, and  
17 understanding the message for her own products,  
18 including Benson & Hedges in 1985, it was her job in  
19 order to be able to know what message she wanted to  
20 produce in 1985, she had to understand the message  
21 that had occurred beforehand and where the product  
22 had been positioned beforehand.

23 She testified that's what you do in your  
24 job if you want to do it correctly, so all she is  
25 doing is understanding what the message was at a

1 particular point in time. Now, this doesn't deprive  
2 Mr. Wobbrock from cross-examining on these issues,  
3 and suggesting that maybe the message is different,  
4 although on this one, it's hard to imagine anything  
5 other than the message that she's described.

6 Your Honor, since it doesn't speak to you,  
7 it seems to be pretty clear to me what the message  
8 is, and you don't have to be an expert to know it.

9 THE COURT: That's why reasonable minds  
10 can differ, counsel.

11 MR. PHILLIPS: But it just seems to me  
12 that this witness, this is her experience, this is  
13 her life. She should be able to characterize the  
14 message of the advertising campaign, not only the  
15 ones that she was working on from 1985 forward, but  
16 with respect to this product, since she had to  
17 understand it in order to redefine the message when  
18 they took it over, she should be able to testify as  
19 to what that message was at various points in time,  
20 and that's helpful to the jury. It is not extending  
21 her beyond her experience, that is her experience.

22 It is not as if she doesn't do that every  
23 day, figure out what the message is that she should  
24 be conveying with a particular product to her  
25 consumers. And for that reason, I just urge

1 Your Honor to reconsider. Otherwise, you are really  
2 limiting the witness in terms of conveying her  
3 experience in a way that could be helpful to the  
4 jury.

5 Obviously, Mr. Wobbrock can cross-examine  
6 on these issues to the extent he wants, but -- and  
7 obviously Mr. Dumas is not going to go beyond that  
8 in terms of saying, "Well, in your opinion, what was  
9 the impact of this kind of advertising scheme in  
10 1962?" That would be expert testimony, but it seems  
11 to me this is not.

12 It wasn't done for this litigation. We  
13 didn't show her these ads for purposes of saying,  
14 "Hey, give us your opinion on this." This is what  
15 she did in 1985 in her job in order to understand  
16 the message of the brand over time and carry a new  
17 message or changed message or modified message or  
18 the same message forward. That is really just  
19 speaking to the witness's experience, which I think  
20 would be helpful to the jury.

21 THE COURT: Counsel.

22 MR. TAUMAN: Mr. Dumas is prepared to tell  
23 Your Honor that he will not ask this witness the  
24 question, "Ms. Lund, in your opinion, were these  
25 advertisements that were between the year 1960 and



1 1964, intending to appeal to a youth market?" And  
2 we all know that that is, in fact, the target of  
3 this testimony.

4 What we're after now is to preempt that so  
5 we don't have to interrupt the jury again. That is  
6 clearly an opinion. They do -- as it happens,  
7 unless something changes, have an expert in  
8 marketing coming up in a couple of days. This isn't  
9 the expert in marketing.

10 She could have been. I acknowledge that.  
11 She has the training, she has the experience.  
12 Mr. Phillips talks about her vast training and  
13 experience, we've heard it. We know that she has  
14 it, she was not designated as an expert witness;  
15 therefore, all her training and experience, however  
16 interesting it is for us is not relevant.

17 Our concern is that she is about -- this  
18 whole lead up is about to elicit an opinion from  
19 this witness as to whether the marketing as  
20 represented by these ads, the five ads that you've  
21 seen, four ads that you've seen, are intended to  
22 appeal to the youth market. So they have another  
23 way of proving this. I wish they didn't, and I'm  
24 sure that they will.

25 They failed to disclose this witness as an

1 expert witness. I think we have no dispute there,  
2 her experience and her training are irrelevant  
3 because she is, as she sits here, a lay witness.  
4 And quite frankly her opinion as a lay witness is no  
5 more helpful to the jury than Mr. Dumas' opinion or  
6 my opinion for that matter, because we're all lay  
7 people. Therefore, she should be treated as a  
8 layperson.

9 My concern is when this question comes,  
10 and it's coming, that we be alerted and not have to  
11 disturb the jury.

12 THE COURT: All right.

13 Mr. Dumas, the Court will not allow that  
14 question to be answered by this witness. The  
15 question that counsel just proposed. The Court will  
16 not allow that question to be answered by this  
17 witness, so that has been preempted.

18 MR. DUMAS: All right, Your Honor. I will  
19 not ask that question. I will ask this witness  
20 whether when she was at Philip Morris, from her  
21 observations, did Philip Morris target youth, target  
22 underage youth, target people below the age of 18.  
23 She will say, "As a matter of fact, no, we did not."

24 THE COURT: Then she would be limiting  
25 that to the time after Michelle Schwarz -- at the

1 time that she was there at Philip Morris. And she  
2 certainly can testify to what she did at that time;  
3 but it can't lead back in to cover this early and  
4 mid-'60s time, from this witness.

5 MR. DUMAS: Your Honor, you're aware that  
6 this witness reviewed Benson & Hedges documents in  
7 1985.

8 THE COURT: I am aware of that.

9 MR. DUMAS: As a fact person who was  
10 there.

11 THE COURT: Not in 1960. In 1985, she was  
12 there reviewing the documents.

13 MR. DUMAS: My question that I intend on  
14 asking this witness, "In 1985, when you reviewed the  
15 Benson brand chronologies and the Benson & Hedges  
16 marketing plans, and the Benson & Hedges  
17 advertisements, and all the records dealing with  
18 Benson & Hedges, did you see any indication that  
19 Benson & Hedges were marketed to underage people?"

20 As a question of fact, she will say, "I  
21 did not see anything in the Benson & Hedges'  
22 documents to say that." It's not her opinion about  
23 whether these ads might not affect youth, she won't  
24 go there, she won't give an opinion about that. But  
25 as a fact person, I did not see anything in the

1 Benson & Hedges' documents that said, "We're  
2 targeting underage youth."

3 THE COURT: Counsel, I know  
4 philosophically there's always a big fight between  
5 what is a fact, what is opinion. One day it might  
6 be a fact, the next day it might be an opinion, and  
7 vice versa. But it really -- it's really counting  
8 angels on the head of a needle. It is really a  
9 tough situation.

10 But I think that question really gets into  
11 an opinion question because another person can read  
12 the same documents and come to a different opinion.  
13 It's not just the fact -- it's not the fact such as  
14 Benson & Hedges started TV advertising in 1966. You  
15 could hand that to 100 people, the conclusion would  
16 be the same. Benson & Hedges started TV advertising  
17 in 1966. That objective fact stands up by itself.

18 But to hand them a document and say,  
19 "Review this document. And, in your opinion, did it  
20 target youth advertising?" And you gave that to ten  
21 witnesses, five of them might say, "Yes, it did,"  
22 and five might say, "No, it didn't." So you're not  
23 talking about facts, you are talking about the  
24 perception of the witness as the opinion of that  
25 witness, not of a fact. It is not an objective fact

1 that stands alone.

2 MR. DUMAS: As you --

3 THE COURT: It only had life passed upon  
4 the opinion of the person reviewing the documents.

5 MR. DUMAS: As you phrased the question, I  
6 think I would probably have to agree with you in all  
7 candor, as much as I wouldn't want to, but I would  
8 probably have to agree with you. But that's not the  
9 question I was going to ask. The question I'd be  
10 asking in her review of the Benson & Hedges'  
11 documents, did she see any factual references in  
12 those documents concerning smokers under the age of  
13 18. Fact, not opinion.

14 THE COURT: So you are going to limit it  
15 to whether she saw any facts relating to youth  
16 advertising?

17 MR. DUMAS: Yes. And Mr. Wobbrock can  
18 vigorously cross-examine her on that issue, which I  
19 am sure he will.

20 THE COURT: Counsel for the plaintiff,  
21 that seems to be limiting where he was going.  
22 Instead of saying, "I reviewed the documents and  
23 there were no youth advertising," he is specifically  
24 saying, "As you reviewed those documents, did you  
25 see any facts related to youth targeting?" And her

1 testimony would be, "No, I didn't see any facts  
2 leading to that."

3 MR. TAUMAN: If, in fact, there were no --  
4 as you put it quite rightly, no interpretation  
5 involved there; in other words, she wasn't  
6 interpreting the advertising, but he she was  
7 testifying as to the absence of a statement in that,  
8 that we are targeting youth, then I think that is a  
9 fact.

10 We obviously have the right to have her  
11 delineate for us exactly which documents she  
12 inspected in order to find -- and when she did it,  
13 in order to find a youth targeting evidence, but  
14 that is a fact. If, on the other hand, she is  
15 interpreting either the documents as an expert or  
16 the ads themselves, then, of course, that gets into  
17 the area of interpretation that Your Honor counted  
18 out.

19 THE COURT: All right.

20 MR. PHILLIPS: Your Honor, I think I'm  
21 confused about what your ruling is. As usual, I am  
22 trailing behind the pack here.

23 I think we resolved the issue that  
24 Mr. Tauman raised which was not the issue that you  
25 started with. He started with the issue, "Well, we

1 know this question is coming and now Mr. Dumas has  
2 said, "This is how I am going to deal with it." And  
3 you said, "That's fine." That is sort of the youth  
4 targeting question.

5 I need to loop back because I think where  
6 we started was, "Can this witness talk about the  
7 message of Benson & Hedges advertising prior to  
8 1985, as a result of her investigation of what the  
9 messages were in the brands at the time?"

10 THE COURT: And the answer is no.

11 MR. DUMAS: I'll do an offer of proof on  
12 that at a later time, Your Honor.

13 THE COURT: All right. Very well.  
14 Let's bring the jury.

15 MR. DUMAS: Your Honor, I am going to  
16 attempt to adhere to the Court's ruling. There are  
17 some gray areas here and we'll have to proceed.

18 THE COURT: All right, counsel. I am sure  
19 experienced counsel as you can walk those tight  
20 lines.

21 MR. WOBBROCK: I think he's telling me to  
22 pay attention, Judge.

23 THE COURT: Oh, that was an alert to the  
24 other side.

25 MR. DUMAS: I don't think I need to alert

1 Mr. Wobbrock as to anything.

2 THE COURT: Bring the jury please.

3 (The following proceedings were held in  
4 open court, the jury being present at 11:25 a.m.:)

5 THE COURT: All right. Members of the  
6 jury, this last little break we had is not counted  
7 against either of the attorneys. You have to count  
8 that against the Court. You can call that a Court  
9 time out. There is an issue that the Court had to  
10 get clear in its mind, I've done that, now we're  
11 ready to proceed.

12 Mr. Dumas, you may proceed with your  
13 question.

14 MR. DUMAS: Thank you, Your Honor.

15 BY MR. DUMAS:

16 Q Ms. Lund, to reconfigure where we were  
17 before the break. As I recall your testimony you were  
18 working at Wells, Rich around 1985, and were asked to  
19 become involved in the Benson & Hedges advertising  
20 campaign, correct?

21 A A little before '85, but, yes.

22 Q '84 or so?

23 A Yes.

24 Q About 1984. And at that time you had  
25 reviewed numerous records and documents concerning the



1 history of Benson & Hedges, including how it was  
2 marketed and the marketing plans and the various  
3 marketing documents, including the ads, correct?

4 A Yes, that's correct.

5 Q And you did that yourself in 1984 as part  
6 of your job?

7 A That's correct.

8 Q And you were talking, as I recall, that  
9 from your review of the records, you came to  
10 understand that Philip Morris had repositioned the  
11 brand of Benson & Hedges around -- not around, in  
12 1966, as a longer cigarette, 100 millimeter cigarette,  
13 a few more puffs in every cigarette, and it was  
14 marketed and labeled as a value cigarette?

15 A Popularly priced.

16 Q Popularly priced cigarette; is that  
17 correct?

18 A Yes.

19 Q And, finally, to sort of summarize what I  
20 understand you previously testified to, the Benson &  
21 Hedges advertisements that you reviewed prior to the  
22 repositioning were not shown on television?

23 A That's correct.

24 Q Okay. Before I move into showing the jury  
25 and walking through with the jury some of the ads that

1 you reviewed after Benson & Hedges was repositioned, I  
2 have a question for you. And please listen very  
3 carefully to my question and let me finish it  
4 completely before you answer it.

5 In reviewing the Benson & Hedges  
6 advertising documents as you have testified to,  
7 concerning Philip Morris efforts in marketing  
8 Benson & Hedges cigarettes, from 1960 to 1964, before  
9 Benson & Hedges was repositioned, okay, in reviewing  
10 those documents, Ms. Lund, did you see any reference,  
11 any factual reference in any of those documents that  
12 Benson & Hedges was being marketed to individuals  
13 under the age of 18?

14 A No, I did not.

15 Q Had you seen something like that,  
16 Ms. Lund, would you remember it?

17 A I certainly would have remembered it.

18 Q Any doubt about that in your mind?

19 A No doubt.

20 Q All right. Now, I want to move on to what  
21 I'm going to call the second generation of  
22 Benson & Hedges ads. This would be after it was  
23 repositioned, okay?

24 A Okay.

25 Q This jury, I can represent to you, has

1 seen a half hour or so video clip of a whole bunch of  
2 Benson & Hedges commercials that were shown on  
3 television involving the longer cigarette and the  
4 various incidents that that can create.

5 Are you generally familiar with those  
6 commercials?

7 A Yes, I am.

8 Q Were those some of the commercials that  
9 you yourself reviewed presumably in 1984 in becoming  
10 familiar with the brand?

11 A I sure did.

12 Q Just so there is no confusion, Ms. Lund,  
13 when did the first Benson & Hedges advertisements  
14 appear on television to your knowledge and  
15 understanding?

16 A 1966.

17 MR. DUMAS: Before I forget, Your Honor, I  
18 will be offering Defense Exhibit 2413, which is a  
19 small packet of some of some of the early 1960 to  
20 1964 Benson & Hedges ads. I see here I neglected to  
21 obtain the color copies, and I will provide those to  
22 the Court later, but I will hand counsel a  
23 black-and-white copy, 2413.

24

25

1 BY MR. DUMAS:

2 Q All right. Ms. Lund, did you bring with  
3 you some selected ads of the new generation, second  
4 generation of Benson & Hedges ads?

5 A Yes.

6 Q What do you call that campaign that went  
7 from 1966 to 1971 or so? Is there a term for it?

8 A That was called the, "Oh, the  
9 disadvantages" campaign.

10 Q I think we recall seeing that. And is  
11 this one of those ads?

12 A This is one of the early ads, yes.

13 Q And the copy, the title there says,  
14 "You'll never have to worry about lighting your nose";  
15 is that right?

16 A That's correct.

17 Q And would this be a print ad that appeared  
18 at this time?

19 A Yes.

20 Q This is an ad that appeared in 1967 called  
21 -- I guess it is just the disadvantages. What was the  
22 disadvantage, Ms. Lund?

23 A The disadvantage was that the long  
24 cigarette couldn't fit on the advertising page.

25 Q You made reference to extra puffs. Is

1 that what we see here?

2 A That's correct. "The cigarette that made  
3 extra puffs popular is also available in a shorter  
4 size."

5 Q And we see for the first time the new  
6 pack; is that right?

7 A That's correct.

8 Q The more standard-type pack?

9 A Yes.

10 Q That was a 1968 ad. 1969 ad, "Benson &  
11 Hedges 100s, America's favorite cigarette break." I  
12 think you already talked about what the break was  
13 about?

14 A Yes.

15 Q Ms. Lund based upon your review of  
16 Benson & Hedges advertising documents in the '84-'85  
17 timeframe, what as a matter of fact based on the  
18 records Philip Morris had, what were the kinds of  
19 people that smoked Benson & Hedges cigarettes?

20 A Benson & Hedges cigarettes in the 1960s,  
21 1970s period were men and women, adult men and women,  
22 and I would -- my recollection is they were 30  
23 something. They were not young. They were 35, in  
24 that range. Not quite middle aged, but 35, in that  
25 range.

1 Q Okay. And what about the split between  
2 men and women?

3 A My recollection is that Benson & Hedges,  
4 at that time, was a kind of both male and female. I  
5 don't know if it was exactly 50-50, but that's my  
6 recollection, it was pretty close to that.

7 Q Now, did Wells, Rich, the advertising  
8 agency that you were working for, did they actually --  
9 were they actually involved in some of these, "Oh, the  
10 disadvantages," and, "Two puffs, three puffs more"  
11 campaigns?

12 A Wells, Rich & Greene created these  
13 campaigns.

14 Q The campaign that we saw, "Oh, the  
15 disadvantages," would you -- did you review those as  
16 indicating that there was some humor being used?

17 A Oh, I think there is humor being used,  
18 yes.

19 Q What kind of humor was it?

20 A The dry British humor.

21 Q In terms of the situations that the Benson  
22 & Hedges television commercials that we saw -- I am  
23 not going to take the time to replay all of those. I  
24 think the jury will have them if they have been  
25 introduced, I think they have. In terms of the

1 situations, from your recollection, what were the  
2 situations that the television commercials depicted?

3 A Well, there were many, but you had, you  
4 know, the man in the briefcase in the elevator, and  
5 you had a fellow driving a Volkswagen, and you had a  
6 guy shaving, as I recall. Oh, you had the one where  
7 the fellow had a beard, and it burned a hole in his  
8 beard and it burned a hole through a newspaper paper.  
9 Those are some of the ones that I remember.

10 Q Now, let's talk about some of the work  
11 that you personally did with Benson & Hedges. What --  
12 strike that, back up.

13 Did you personally prepare ad copy for  
14 the, "Oh, the disadvantages" campaign?

15 A No, I did not.

16 Q What ad campaign did you personally work  
17 on after you reviewed the Benson & Hedges records and  
18 documents and ads as we have talked about?

19 A We came up with a new idea in that '84-'85  
20 time period. It was called the, "He said, she said"  
21 campaign.

22 Q And that was something that you were  
23 intimately involved with?

24 A Yes, I was.

25 Q And you brought an example of one of

1 those, I think?

2 A Yes, I did.

3 Q The copy seems to read, "She likes sushi,  
4 he thinks it's a raw deal."

5 A That's right.

6 Q Oh, "But there is one taste they agree on:  
7 Benson & Hedges." Is that right?

8 A That's right.

9 Q Is this a particular product or a line  
10 extension or --

11 A No. This was just -- it shows  
12 Benson & Hedges Lights, but it was for Benson  
13 & Hedges.

14 Q Did Philip Morris put a lot of money and  
15 effort and time into this campaign, the "He said, she  
16 said"?

17 A Well, I think it did, yes.

18 Q Was it a successful ad campaign, this one  
19 that you worked on?

20 A Well, then I guess I thought it was a good  
21 campaign. I think it is a pretty dreadful campaign  
22 when I look at it now. I don't have any idea really  
23 what we were doing back then. I guess it was building  
24 on popularity. The brand was not doing well.  
25 Benson & Hedges was not doing well, and this campaign



1 certainly didn't help us.

2 Q How did the market, in terms of sales of  
3 Benson & Hedges, what occurred during this timeframe?

4 A Benson & Hedges had been falling and  
5 continued to fall.

6 Q What did the failure, if I can use that  
7 term, of your campaign, "He said, she said," teach you  
8 about marketing?

9 A Well, I mean, the first thing it teaches  
10 you is you don't always get it right. You can spend  
11 behind an advertising campaign, and if people don't  
12 connect to it, and it doesn't have something to say  
13 that they're interested in they are not going to buy  
14 your brand, and they didn't.

15 Q You indicated, I think, that you worked  
16 for Wells, Rich for five years?

17 A A little better than five.

18 Q A little better than five years. Where  
19 did you go to work after Wells, Rich?

20 A I went to work for Philip Morris.

21 Q And when did you start work at Philip  
22 Morris, what year?

23 A In 1985.

24 Q Why don't you walk us through, if you  
25 would, your various positions. And I realize it has

1       been a few years and give us your best estimate as to  
2       what years we're talking about as you progressed in  
3       your career at Philip Morris, so we'll at least have  
4       your entire career in context for the remainder of  
5       your testimony.

6           A       Okay.  When I went to Philip Morris in  
7       1985, I was the Merit brand manager.  And I was there  
8       for about a year.  And then I became the Marlboro  
9       brand manager about a year later, and I was the brand  
10      manager for several years.  And then I became the  
11      group director for Marlboro for several years.  I  
12      became the license --

13          Q       Let me stop you there.

14          A       Okay.

15          Q       What does the brand manager do?

16          A       The brand manager is the person who is  
17      responsible for understanding the market, for  
18      getting -- writing a marketing plan and including what  
19      the advertising was going to be, what the strategies  
20      were going to be, what the promotions were going to  
21      be.  And making sure that that brand was implemented  
22      in the marketplace.

23          Q       And you said around the late '80s, you  
24      became group director for Marlboro?

25          A       Right.

1 Q What does that mean?

2 A That is just a higher position in  
3 Marlboro. So I have brand managers who I was working  
4 with.

5 Q And this was, of course, in New York City?

6 A Yes.

7 Q Your next position at Philip Morris?

8 A After group director I was made vice  
9 president for Marlboro cigarettes, and I held that for  
10 a while.

11 Q What does a vice president do?

12 A The vice president for Marlboro cigarettes  
13 was the one that had the directors and the brand  
14 managers working with her, in that particular case, on  
15 Marlboro cigarettes. Just a higher level of  
16 responsibility.

17 Q Then your next position?

18 A Then I was group vice president for  
19 Marlboro cigarettes and new products.

20 Q And then finally you became involved in  
21 your current position a couple years ago?

22 A Yes, senior vice president of marketing.

23 Q We're going to talk about your work with  
24 Merit cigarettes, as well as obviously your  
25 responsibility for Philip Morris advertising.

1 Probably get to that after the noon hour, but I want  
2 to shift gears.

3 A Okay.

4 Q Okay. You started working for Philip  
5 Morris as a employee of Philip Morris in 1985; is that  
6 right?

7 A That's correct.

8 Q When you started working for Philip Morris  
9 in 1985, what was the company's position on the  
10 relationship between smoking and disease?

11 A Ah, when I joined Philip Morris in 1985,  
12 the company's view was -- and position was that  
13 cigarette smoking was dangerous and that it increased  
14 a person's risk of contracting a disease like cancer  
15 and other diseases.

16 Q The company didn't flat out acknowledge  
17 that smoking caused disease, did it?

18 A It did not.

19 Q What was Philip Morris' position in 1985,  
20 when you joined the company, as you understood it, the  
21 company's position on the relationship between whether  
22 smoking was addictive?

23 A I think that the company didn't use the  
24 word addictive. The company used the words that it  
25 was habit forming for some people. And for some

1 people, easy to quit, but for others very hard to  
2 quit. So not the words, but the idea of addiction.

3 Q And, in fact, the company expressly denied  
4 addiction, using that term?

5 A Using that term, yes.

6 Q That's 1985. I want to move forward.  
7 What is Philip Morris' current position regarding the  
8 relationship between smoking and disease? And by  
9 disease, I mean lung cancer, I mean heart disease, I  
10 mean emphysema, I mean all of that.

11 A Our position is that cigarette smoking  
12 causes lung cancer and other diseases.

13 Q What is Philip Morris' position, current  
14 position, concerning whether smoking is addictive?

15 A Our position is smoking is addictive.

16 Q To your knowledge and understanding and  
17 awareness as a layperson, is Philip Morris' position  
18 concerning the relationship between smoking and  
19 disease, and the relationship between smoking and  
20 addiction, fully consistent with that of the public  
21 health community and the Surgeon General?

22 A I believe it is completely consistent.

23 Q That has not always been in the case, has  
24 it?

25 A That has not.

1 Q Philip Morris' position concerning these  
2 issues historically has been inconsistent with the  
3 Surgeon General, correct?

4 A I think that's fair to say, yes.

5 Q Let's talk about that.

6 A Okay.

7 Q When did Philip Morris come around to  
8 taking a position consistent with the Surgeon General  
9 at the public health community concerning the  
10 relationship between smoking and disease and  
11 addiction?

12 A Well, I think that the company took that  
13 position and a consistent position some time in the  
14 late 1990s.

15 Q By the late 1990s, you had been with the  
16 company, 12, 13 years, whatever?

17 A That's correct.

18 Q Based on your observations, based on your  
19 employment, your work with -- at Philip Morris, why  
20 did it take Philip Morris so long?

21 A Now, that is a really good question. You  
22 know, when I came to Philip Morris in 1985, the kind  
23 of anti-cigarette environment was kind of growing.  
24 Before that, you know, I think it wasn't quite so  
25 unacceptable. So there was a lot of pressure on the

1 cigarette companies to defend their actions in the  
2 marketplace.

3 Our marketing our products and smokers,  
4 wherein they used to be able to choose and be viewed  
5 tolerantly, you know, one can make this choice, viewed  
6 as really unacceptable, that the habit was becoming  
7 socially unacceptable. The company, I saw it happen,  
8 I think that more and more pressure that we faced in  
9 the marketplace, and with society saying, "You guys  
10 are not doing the right thing," and so forth and so  
11 on, that we became, I think, very defensive about our  
12 positions.

13 And I think that we stuck to the legal and  
14 the technical definitions of what caused lung cancer.  
15 We focused on the mechanism, what the scientist didn't  
16 seem to know, the mechanism on when someone gets lung  
17 cancer and another person doesn't get lung cancer.  
18 And we focused on the fact that while even smokers  
19 would call smoking addictive, we held onto the  
20 technical definition of addition, and didn't just say,  
21 "Well, it's addictive."

22 And I think that we came around as society  
23 continued to evolve on this topic and we evolved, and  
24 the States' Attorneys General, and the dialog with  
25 public health communities increased, we said, "We

1 really have got to take a position which is  
2 fundamentally not different. We always said smoking  
3 was risky and habit forming, but to be absolutely  
4 clear, we're going to take the position and not mince  
5 any words. This is what this product is."

6 Q From your observations did society's  
7 attitudes toward smoking change quickly?

8 A Well, I think it probably took some time,  
9 you know, when it started to, it started to build.  
10 But I think that there was really heavy anti-smoking  
11 environment in the 1980s, coming into the 1990s, up to  
12 2000.

13 Q Initially, did Philip Morris resist that?

14 A Yeah. I think, as I said, I think we  
15 became defensive.

16 Q Did Philip Morris sort of take a  
17 circle-the-wagons kind of approach?

18 A Yeah. I think we were kind of in the  
19 bunker.

20 Q In the bunker?

21 A Yeah.

22 Q What do you mean by "in the bunker"?

23 A I think we were trying to defend ourselves  
24 from this onslaught. How would we market a product  
25 that was legal in the United States? How would we do



1 it responsibly? What could we do? The pressure was  
2 mounting on us to, frankly, not to market the product  
3 at all.

4 Q Looking back on it, Ms. Lund, should  
5 Philip Morris have adopted the public health  
6 community's view and the Surgeon General's view of the  
7 relationship between smoking and disease and the  
8 relationship between smoking and addiction, should  
9 Philip Morris have adopted that position sooner than  
10 it did?

11 A Perhaps we should have. I think we waited  
12 a bit too long. We did put the Surgeon General's  
13 warning on every pack.

14 Q Okay. Why the change? Why did Philip  
15 Morris change its position on these issues?

16 A Well, we changed our position as we saw  
17 our position in the marketplace changing. And also  
18 because under kind of a new leadership in the 1990s,  
19 we created a mission statement that was a new mission  
20 statement. It was about being responsible and  
21 effective and respected in society.

22 And that was actually quite a tall order.  
23 And as part of that mission, and the values that we  
24 outlined in that mission, we felt one of the things  
25 that was critically important for us to be absolutely

1 transparent in our views, and there could be no  
2 confusion about reliance on the public health  
3 community's view of this. That's what's important.

4 So in keeping with our mission and in  
5 keeping with the dialog with the States' Attorneys  
6 General and others, this is why we've done it.

7 Q You talked about respect. Did you view  
8 that Philip Morris had lost some respect?

9 A Oh, I think clearly we have.

10 Q Respect by whom?

11 A I think by society. I think that people  
12 don't view our company the way they once had because  
13 they don't like the product.

14 Q Does Philip Morris want to regain some of  
15 that respect?

16 A Absolutely, we do.

17 Q How are you doing to do that, Ms. Lund?

18 A Well, we're going to work hard and we're  
19 going to work to be responsible is hard because it is  
20 a dangerous product. But our job is to figure out if  
21 we can continue in the effort to see if there is a way  
22 to reduce the risk of the product.

23 How we market the products is very  
24 important. And we are continuing to restrict the  
25 access of our messages, and be ever more responsible

1 in our efforts to reach only adult smokers. And I  
2 think it is important for us to continue to have a  
3 dialogue with the public health community, with the  
4 government, about what is right, what society expects,  
5 what we should be doing.

6 And I think the last point, I think that  
7 we believe that the FDA regulation of our industry  
8 would actually be a benefit. It would allow us and  
9 our competitors to have an understanding of exactly  
10 how, if we are able to create these new products, we  
11 can bring them to the market.

12 Q You mentioned the FDA, the Food & Drug  
13 Administration?

14 A Yes.

15 Q And isn't it true, Ms. Lund, that Philip  
16 Morris has resisted Food & Drug Administration  
17 regulation for years?

18 A Well, I think it probably has, but it is  
19 not resisting it now.

20 Q Are your competitors in the same league  
21 that you are concerning the FDA?

22 MR. WOBBROCK: Objection, Your Honor. I  
23 don't think this case is about anybody but Philip  
24 Morris.

25 THE COURT: Sustained.

1 MR. DUMAS: I'll withdraw the question.

2 THE COURT: All right. Proceed, please.

3 BY MR. DUMAS:

4 Q How is Philip Morris welcoming FDA  
5 regulation? What is it doing?

6 A Well, I think it is working in Washington  
7 really trying to work with senators and congress  
8 people and other folks in government to try to see how  
9 we can encourage the Federal Drug Administration, and  
10 come to some agreement on how this product can be  
11 further regulated.

12 Q You mentioned that one of the factors, as  
13 I understood your testimony, for the change was the  
14 suits by the attorney generals?

15 A Correct.

16 Q Tell us about that. How did that impact  
17 Philip Morris?

18 A Well, that was -- that was a big wake-up  
19 call for us. We had the highest government  
20 authorities in just about every state across the  
21 country saying, "We're going to sue you. And we're  
22 going to take you for years in court in a battle about  
23 what it is you're doing." And, you know, we said,  
24 "Boy, clearly society has changed when every one of  
25 these Attorneys General wants to sue us," and we said,

1 "We could get tied up in lawsuits forever with the  
2 States' Attorneys General, or we could do what we were  
3 on the path to do." You know, we have to strike a  
4 balance between being able to market a product that is  
5 legal to adults in a responsible way and stop  
6 resisting kind of what society was asking us to do.  
7 So we settled with the States' Attorneys General.

8 Q We're going to talk more about that later  
9 on today. That includes a suit filed in Oregon by  
10 Attorney General Hardy Meyers?

11 A That is correct.

12 Q You talked about new leadership at Philip  
13 Morris. Who are you referring to when you said the  
14 new leadership?

15 A Mike Szymanczyk.

16 Q When did Mr. Szymanczyk take the helm?

17 A In 1997, toward the end, I think.

18 Q How did that change the company?

19 A I think it's changed the company  
20 dramatically. I think that Mr. Szymanczyk has come in  
21 at a time when the pressure was at its highest peak,  
22 and it is absolutely clear that this company had to do  
23 things differently, and to do things better, I guess.  
24 I don't think that the company was irresponsible  
25 before, but it had to be more responsible. And he

1 really has a vision about it and he is quite a leader  
2 in that regard.

3 MR. DUMAS: Thank you, Ms. Lund.

4 Your Honor, I am prepared to go to a whole new area.

5 THE COURT: In that case, let's not go to  
6 a new area.

7 Members of the jury, let's take our noon  
8 break at this time. Be back in the jury room at  
9 1:25.

10 (The following proceedings were held in  
11 open court, out of the presence of the jury at  
12 11:55 p.m.):

13 MR. WOBBROCK: Your Honor, I have a  
14 matter.

15 THE COURT: All right. You may proceed.

16 MR. WOBBROCK: It might take more than  
17 just a minute.

18 Twice now the witness has volunteered that  
19 it is a legal product. The Court's motion in  
20 limine, Item 11, reads, "Plaintiff's motion to  
21 exclude evidence of tobacco legality is granted in  
22 part and denied in part. The defendant may not  
23 argue that it is not liable because cigarettes are a  
24 legal product. Defendant may offer evidence of  
25 compliance with statutes and regulations as proof

1 its product is not defective and does not  
2 negligently manufacture design and it did not commit  
3 fraud."

4 Twice now the witness has said, "This is a  
5 legal product." That's had nothing to do with  
6 exceptions to the Court's ruling, and I ask the  
7 Court to admonish counsel not to violate motions in  
8 limine that have been entered by the Court.

9 It clearly had nothing to do with whether  
10 it was a negligently-manufactured product or not.  
11 It simply had to do, "We sell a legal product and,  
12 therefore, we need to change." That had nothing to  
13 do with anything, and it's outside the Court's  
14 allowance of this kind of testimony and shouldn't be  
15 elicited anymore from any witness.

16 MR. PHILLIPS: May I be heard briefly,  
17 Your Honor? The Court's ruling is that counsel may  
18 hear -- defense counsel may not argue that legality  
19 means that we're not negligent. Legality means that  
20 the product is not defective and that legality  
21 doesn't mean that we didn't commit fraud.

22 And that's true, and we're not going to  
23 argue that; and at this point, we haven't argued  
24 that. The legality of the product is part of the  
25 evidence in the case that goes into the question of

1           whether each of these things is or is not negligent.

2           They are making claims in this case,  
3           you've heard it, Your Honor, that we shouldn't be  
4           manufacturing the product at all. The fact that  
5           it's legal, the fact that it has warnings, the fact  
6           that we comply with various regulations is part of  
7           the story on the other side. That's all we've been  
8           doing, Your Honor.

9           I didn't hear Ms. Lund say because it's  
10          legal, we are not liable under any of these things,  
11          and I don't think that Mr. Dumas' question led it in  
12          that direction. The reality is that that evidence  
13          is there and the jury is going to have to weigh  
14          their allegations against Philip Morris' compliance  
15          with a variety of legal restrictions with respect to  
16          sale of its products. There is no violation of the  
17          notion in limine.

18          MR. WOBBROCK: There is, Your Honor,  
19          because the evidence that that came in for is not in  
20          any of the permissible realms that this Court has  
21          allowed it. It's just simply a gratuitous  
22          statement. "We sell a legal product and we need to  
23          know how to conform to the future." That's not what  
24          this is all about. They can sell a legal product,  
25          but if it's defective or they're fraudulent, they're



1       liable. That's what this case is about.

2               Just like if you sell a Firestone tire or  
3       a Ford Escort. It might be legal to sell it, but if  
4       it's defective, you're responsible, you've got to  
5       pay. That's what this case is about. To say, "We  
6       sell a legal product. We need to know how to  
7       conform to the future," that has nothing to do with  
8       anything.

9               And it's clearly within the Court's  
10       ruling, and they shouldn't be gratuitously just  
11       throwing out, "It's a legal product," and that's  
12       what they did twice.

13              MR. PHILLIPS: The testimony as I heard  
14       it, Your Honor, was that it's a legal product for  
15       purposes of talking about the existing legal  
16       regulatory framework and talking about the need for  
17       additional regulatory framework. That's relevant to  
18       the issue of negligence, it's relevant to the issue  
19       of product liability, it's relevant to the issue of  
20       punitive damages.

21              No one is saying and no one is going to  
22       say that it's because it is legal that there is no  
23       liability in this case under any of the remaining  
24       counts in the cases.

25              MR. WOBBROCK: Judge, if they had said it

1 in regard to her comments about the FDA, I wouldn't  
2 be talking to you right now. That's not what they  
3 said it in regards to. Counsel recollection is  
4 wrong. It had not connection with that. They just  
5 threw it out there.

6 MR. PHILLIPS: I don't have the record in  
7 front of me. That's the context I thought it was  
8 in, Your Honor. But, in any event, it is not  
9 outside of any rulings of the Court in this issue.

10 THE COURT: All right, counsel for the  
11 defense. Be aware of that, and let's not overly use  
12 that terminology.

13 MR. DUMAS: Thank you, Your Honor.

14 THE COURT: All right. Let's go eat.

15 MR. DUMAS: 1:30?

16 THE COURT: 1:30.

17 (Noon Recess taken at 12:05 p.m.)  
18  
19  
20  
21  
22  
23  
24  
25

## AFTERNOON SESSION

(Whereupon, the following proceedings were held in open court, out of the presence of the jury at 1:30 p.m.):

THE COURT: Proceed please.

MR. TAUMAN: This is an argument. I have a logistical issue. I'm not sure how to approach it or handle it. There has been another change in the exhibit -- or in the witness list, which is fine, that is their prerogative, but the change -- the major change is a witness who was on the list and has been on the list from the beginning, Mr. Talen (ph), hopefully isn't hearing this for the first time, is dropped from the witness list.

And a witness who was listed initially on the witness list, and then dropped and this was I don't know at least a week ago I believe, that this witness was dropped. Now, Mr. Phillips tells me that he is being reinstated as a witness or at least as a potential witness. We think that there is something crazy going on here. I don't know what it is. This in particular is just totally unfair.

To take a witness, and then remove him from the list, when they are removed from the list they're gone, it's like they never appeared there.

1 And now a week later they want to put him back on  
2 the list. I just don't think that that's what was  
3 contemplated in the Court's ruling that the  
4 witnesses be disclosed. But, you know, obviously,  
5 if he appears and Your Honor allows him to testify,  
6 we'll figure out a way of figuring out who he is.

7 THE COURT: Mr. Phillips?

8 MR. PHILLIPS: Well, we are trying to  
9 streamline the case, there is no doubt about that,  
10 so we're dropping some witnesses and we're trying  
11 now -- the individual that I just told him about is  
12 someone they knew about because he was on the  
13 original witness list. We did take him off because  
14 we didn't think we were going to be able get ahold  
15 of him.

16 And I still don't know whether I'm going  
17 to be getting ahold of him. I told him today  
18 because I want them to know exactly what I know,  
19 which is I am going to try to get ahold of him. If  
20 I can get him here, then I want them to know he is  
21 going to be back on the list.

22 We went through this rigmarole with  
23 Mr. Bible who wasn't on their list. So Mr. Tauman  
24 is suggesting that, well, having told us that he was  
25 on the list and taken him off somehow we tricked

1 him. The trial is a dynamic process. I wish I was  
2 more of a scientist than I am at it, but I'm not,  
3 but they knew about him before.

4 As soon as I thought about putting him  
5 back on, I told him today. And, frankly, I don't  
6 know even if I am going to get him, but I wanted to  
7 let them know as soon as I knew. So I don't know  
8 what concern is. People are dropping witnesses, but  
9 obviously that is our prerogative. For purposes of  
10 dropping witnesses, I don't think it is unfair.

11 THE COURT: As soon as you know for sure,  
12 let them know.

13 MR. PHILLIPS: Absolutely. That's why I  
14 told them even though I wasn't sure today.

15 THE COURT: Because he may not be a  
16 witness at all if you can't get him.

17 MR. WOBBROCK: Judge, the problem is it is  
18 much more complicated than that. I think when they  
19 list these people and we did not do anything like  
20 what they're doing to us to them. Okay. They list  
21 these people. We start trying to figure out who  
22 they are. We start doing a little background work,  
23 trying to figure out who they are. And there is  
24 nothing wrong about that.

25 In fact, there is probably something wrong

1 if we didn't. That is our job. So we stopped all  
2 of that. We stopped all of it over a week ago. We  
3 were trying to figure out who was this person, you  
4 know, and we did the kind of research the lawyers do  
5 to find out who he was.

6 Now, we're going to find out, we have a  
7 matter of hours or maybe days to find out, but we  
8 stopped the whole process. I don't think it is fair  
9 to start and stop like that. We spent all weekend  
10 preparing for witnesses who now are not going to  
11 show.

12 That is another issue, but to take  
13 somebody off and put them back on, I think is  
14 grossly unfair. Otherwise, this whole process  
15 didn't make any sense in the first place. I don't  
16 think the Court should countenance it.

17 MR. PHILLIPS: Your Honor, when we give  
18 them the name under the Court's rules, we really  
19 don't have to tell them anything. Right, he  
20 probably did some -- I don't know what he did. He  
21 hasn't told you how he's actually been prejudiced,  
22 other than the fact that he had the name for three  
23 weeks and didn't have it for a week.

24 I am not going to pry into his work  
25 product, but one of the reasons that I told

1 Mr. Tauman today was to let him know, and I told him  
2 who he is. So I told him more than he is permitted  
3 to know. To the extent there is any prejudice, I  
4 have now saved them a week.

5 The point is, we need to make judgments.  
6 We're trying to make the right judgments. We are in  
7 the defense of the case. We're reacting to the  
8 plaintiff's case. Plaintiffs have their own  
9 presentation. They weren't reacting to anything.  
10 It makes sense for the defendant to try to  
11 streamline and focus their attention on what they  
12 think is important in the case. That's what we're  
13 trying to do.

14 I am doing the best I can to tell them as  
15 I know, and, you know, I frankly think this argument  
16 that having known about this guy for three weeks,  
17 and not paid attention for a week and now I tell  
18 them who he is, is a just a little bit over the top  
19 in terms of the an expression of prejudice. I am  
20 letting them know as I know, Your Honor.

21 THE COURT: Well, the Court's inclination  
22 at this time would be to let the witness testify if  
23 you can get him.

24 MR. PHILLIPS: I will let you know as soon  
25 as I know. One more matter I think -- do you want

1 to, since I probably don't know what I'm saying on  
2 this, Mr. Lane?

3 MR. DUMAS: That won't stop you from  
4 expressing the position.

5 MR. PHILLIPS: Hey, hey.

6 THE COURT: All right, Mr. Lane.

7 MR. LANE: Your Honor, this is an issue we  
8 dealt with once briefly last week, thought we had it  
9 handled. We have outstanding an order for purposes  
10 of all the motions in limine. We have gone back and  
11 forth and back and forth, got it down to one  
12 particular issue in dispute.

13 And the Court heard about it last week,  
14 and it had to do with smoking histories. And I took  
15 the instructions from the Court that the language  
16 plaintiff proposed and I can put that up, for the  
17 Court just to see again, if we can have that on the  
18 screen.

19 What plaintiff originally proposed in the  
20 form of order is what is underneath the line strike  
21 out portion. So the order originally read,  
22 "Plaintiff's motion to exclude evidence of witness  
23 smoking is allowed. The smoking history of some  
24 witnesses, such as decedent parents, is relevant as  
25 objective facts affecting the decedent's smoking



1 decisions. The smoking history of a Philip Morris  
2 witness is limited to those witnesses with knowledge  
3 of the development of Merit cigarettes."

4 Now, that's what originally was proposed  
5 and the defendant struck all that, and changed it  
6 to, "Denied based upon subsequent representations  
7 made by plaintiff's counsel." That had to do with  
8 the hypothetical question.

9 We came to the court, we hashed it out and  
10 the solution I thought was plaintiff's language that  
11 was originally in there, was going back in there.  
12 And in addition, our issue of bias was going to be  
13 added to that portion.

14 In light of Mr. Phillips's argument that  
15 he should be able to present bias issues to some  
16 witnesses, we don't have an agreement yet on this  
17 Section 15. Mr. Phillips has an original order  
18 prepared for the Court's signature right now if by  
19 interlineation we can put the appropriate language  
20 into Section 15 right there.

21 MR. PHILLIPS: I'm not remembering our  
22 conversation last week, Your Honor, and I apologize  
23 for it. I know he came up with this order and I  
24 know we had a discussion. I just don't remember  
25 what you actually said. I am not going to suggest

1       that what Mr. Lane is saying here is different from  
2       what you said.

3               I guess the practical question I have is,  
4       we have a few witnesses left. I am not sure what  
5       the significance of this is anymore. I think that,  
6       as I sort of argued to you this morning, I  
7       interpreted the ruling essentially as taking smoking  
8       history off the table for purposes of exclusion.

9               But you don't want people talking  
10       extensively about their smoking history under any  
11       circumstances, and I don't think anyone frankly has.  
12       I think that when you track what they've written  
13       now, and you try to implement it, is probably going  
14       to be more a cause for problems or stumbling blocks,  
15       or debate in court and pulling the jury out than  
16       just simply saying that the issue on smoking  
17       histories is basically denied based on the course of  
18       conduct of the trial here and the representations  
19       that have been made and the way that the evidence  
20       has come in.

21              And the Court can always govern the  
22       parties with respect to that question if it  
23       perceives anyone is spending too much time on that  
24       subject.

25              THE COURT: All right. If you take 15

1 out, you've got an agreement.

2 MR. PHILLIPS: If you say the motion is  
3 denied subject to rulings on specific issues, then I  
4 think that is right.

5 THE COURT: Counsel can you do that? I  
6 just want an order to sign.

7 MR. PHILLIPS: I want you to sign an  
8 order, too.

9 MR. LANE: Your Honor, I hear that we  
10 aren't as far into the case as we are, but there are  
11 a number of defense witnesses and the Court was, I  
12 believe, very specific about a defense witness that  
13 didn't have knowledge of the development of the  
14 Merit cigarettes was an important factor in the  
15 Court's original rulings. And as Mr. Phillips is  
16 fond of saying, we need some guidelines.

17 THE COURT: You guys don't plan to do  
18 that, do you?

19 MR. PHILLIPS: If I said this order is  
20 fine, then the next thing Mr. Wobbrock stands up and  
21 says, "Now, let's strike the testimony of Mrs.  
22 Lund."

23 THE COURT: Oh, no.

24 MR. PHILLIPS: He'll do that because he is  
25 going to say, "Well, she wasn't involved in the

1 development of Merit cigarettes." And I thought you  
2 already ruled on the issue this morning. It was  
3 okay for the subject matter, let's move on. That's  
4 why I think this language is just another trap for  
5 trying to strike testimony.

6 THE COURT: You don't plan on moving to  
7 strike Ms. Lund's testimony, do you?

8 MR. WOBBROCK: No, Your Honor. You had  
9 previously ruled that they weren't to talk about  
10 this. I have to tell you, Judge, they have set up  
11 roadblocks in motions in limine and then violated  
12 them when it suited their purpose.

13 You know, we weren't allowed to put on the  
14 evidence, but when they decided that they want to,  
15 they do. For example, the Master Settlement  
16 Agreement. You ruled that wasn't coming in. That  
17 has been long walked over by them. You know, it's  
18 all over the case now.

19 We're just going to have to deal with it  
20 and I'm prepared to deal with it. But, you know,  
21 counsel asked Mrs. Lund, Miss Lund, Ms. Lund, I'm  
22 sorry -- about her smoking history and that had been  
23 out of the case.

24 So he elicited that testimony. It is not  
25 like somebody volunteered it. I just think they got

1 it both ways.

2 THE COURT: Wasn't that sort of diminimus?

3 MR. WOBBEROCK: The idea, Judge, was that  
4 we weren't going to let it just be swayed by whether  
5 people had the personal proclivities regarding  
6 smoking one way or another, and now it's all over  
7 the case.

8 MR. PHILLIPS: All I am suggesting to you,  
9 Your Honor, I think based on the course of conduct  
10 by both parties this has become sort of a non-issue.  
11 And as long as no one spends too much time on it,  
12 let's get on with the trial. As far as roadblocks,  
13 we could be, well, much further along with Mrs. Lund  
14 if we didn't have so many this morning.

15 MR. LANE: Your Honor, there is no reason  
16 why the original proposed order language, with the  
17 issue of bias as the Court ruled last week, formed  
18 the basis for the order, and we go forward. Why is  
19 it water behind the bridge, now Mr. Wobberock has  
20 indicated he is not going to move to strike  
21 Ms. Lund's testimony. We have more witnesses coming  
22 down the pike, including addiction specialists and  
23 other professionals and whatnot. I don't want the  
24 jury hearing about their smoking history, so there  
25 is a point to this.

1           MR. PHILLIPS: The language we propose is  
2 this, Your Honor. "Plaintiff's motion to exclude  
3 evidence of witness smoking history is denied based  
4 on the subsequent representation by either  
5 plaintiff's counsel and the Court's trial rulings,"  
6 like the one you made this morning with Mrs. Lund.

7           And I can guarantee you, based on the  
8 discussions we had about this and the interest on  
9 trying to move this case forward, we are not going  
10 to spend a lot of time on with anyone on smoking  
11 history. I can't guarantee that the subject won't  
12 come up, but it is obviously not a major portion of  
13 anyone's approach to examine anyone.

14          MR. LANE: Well, as the Court heard before  
15 we started the case and then while we started the  
16 case, we cut out a world where we narrowed the  
17 universe. There were people surrounding Michelle  
18 Schwarz that smoking history was relevant for why  
19 she started to smoke.

20          And then we carved up the world again, and  
21 we said people who had intimate knowledge of the  
22 development of the Merit cigarette, that would be  
23 useful, but then the rest of the world was out.  
24 Now, we're saying the rest of the world is back in  
25 and we can still go forward with what the Court

1 originally ruled.

2 THE COURT: All right. We'll go with the  
3 way you have written 15.

4 MR. PHILLIPS: Who are you referring to  
5 there?

6 THE COURT: Referring to Plaintiff's  
7 counsel. We're going to take his 15.

8 MR. PHILLIPS: I'll hand this one up, and  
9 I think the implications Mr. Lane will interlineate  
10 accordingly.

11 MR. LANE: I will interlineate and leave  
12 the original with the Court for a signature now.

13 MR. WOBBROCK: Your Honor, back on the  
14 issue of this witness that was not -- that was  
15 disclosed and then was withdrawn and then was  
16 disclosed. I don't want to take everyone's time on  
17 this except it is very important, so I do want to  
18 take everyone's time, including the Court's.

19 We had stopped our investigation. We  
20 don't know where this person lives. We don't know  
21 this person's phone number and address. And I think  
22 at the very minimum -- and it has been more than a  
23 week since this person has been withdrawn. The  
24 Court should order that if the defendants are going  
25 to be allowed to call this person, we be given his

1 full name, address and phone number.  
2 THE COURT: Counsel, do you want to help  
3 us out a bit?  
4 MR. PHILLIPS: Pardon?  
5 THE COURT: Are you going to call this  
6 witness? Do you want to help us out a bit?  
7 MR. PHILLIPS: Your Honor, if I can get  
8 ahold of him, I will give them the phone number as  
9 well.  
10 MR. WOBBROCK: When will that be, though,  
11 the night before or today or what?  
12 MR. PHILLIPS: As soon as I can get ahold  
13 of him. And if I do, I will give it to you. This  
14 is well beyond what the Court requires of any  
15 defendant in this sort of case, Your Honor.  
16 THE COURT: All right. Use your best  
17 effort to get ahold of this witness as soon as you  
18 can. As soon as you do that, give them that  
19 additional information.  
20 MR. PHILLIPS: Fine. Thank you,  
21 Your Honor.  
22 THE COURT: They need to do some  
23 background research on this person.  
24 MR. PHILLIPS: I understand.  
25 THE CLERK: We don't want any phantom



1 witnesses coming in here in this court. It  
2 frightens people.

3 All right. Bring the jury in, please.

4 (The following proceedings were held in  
5 open court, the jury being present at 1:47 p.m.:)

6 THE COURT: You guys came out a little  
7 slow there. Are you ready to go now?

8 Mr. Dumas, proceed with your witness,  
9 please.

10 MR. DUMAS: Thank you, Your Honor.

11

12 FURTHER DIRECT EXAMINATION

13

14 BY MR. DUMAS:

15 Q Ms. Lund, in a few moments we're going to  
16 move into your experience with the Merit brand of  
17 cigarettes, marketing the Merit brand of cigarettes  
18 upon your arrival at Philip Morris in 1985, correct?

19 A Correct.

20 Q Okay. But before we do that, I am going  
21 to go back just a couple issues ago, and clean up a  
22 couple of quick points and then we'll move right  
23 along. First of all, with regard to the, "Oh, the  
24 disadvantages" Benson & Hedges campaign, in addition  
25 to some of those ads which we showed the jury and

1 discussed about this morning, you brought with you  
2 copies of, I don't know, about a dozen or so  
3 additional "Oh, the disadvantages" advertisements for  
4 Benson & Hedges; is that correct?

5 A That's correct.

6 MR. DUMAS: Your Honor, I will be offering  
7 Defendant's Exhibit 2412. I provide that to  
8 counsel -- I will provide that to counsel. I will  
9 have color copies of those for the jury and the  
10 Court tomorrow.

11 MR. WOBBROCK: Your Honor, perhaps we  
12 could be heard about this later when it is more  
13 convenient.

14 THE COURT: All right. Do you wish to be  
15 heard on it before the Court accepts them?

16 MR. TAUMAN: Yes, Your Honor.

17 THE COURT: All right. We will delay  
18 accepting them at this time, Mr. Dumas.

19 MR. DUMAS: Well, if there are objections  
20 based on foundational matters that I need to go into  
21 with this witness, I will take the time if that is  
22 necessary.

23 MR. WOBBROCK: No.

24 MR. DUMAS: Okay. Very good.

25

1 BY MR. DUMAS:

2 Q Now, Ms. Lund, I want to -- one other  
3 clean-up matter. Let's go back to Wells, Rich, okay?

4 A Okay.

5 Q You were there five years, correct?

6 A Correct.

7 Q Wells, Rich was one of the Philip Morris'  
8 advertising agencies in New York, correct?

9 A Yes.

10 Q Wells, Rich was the agency or perhaps one  
11 of the agencies involved in creating the, "Oh, the  
12 disadvantages" campaign; is that right?

13 A That's right.

14 Q Remember to please keep your voice up.

15 A Oh, sorry.

16 Q When you were at Wells, Rich, you worked  
17 on two Philip Morris' products, Players cigarettes and  
18 Benson & Hedges cigarettes, correct?

19 A That's correct.

20 Q And I think you described your job as an  
21 account representative, as sort of a go-between, a  
22 go-between between the creative folks in the ad  
23 agency, the artists and photographers and copyrighters  
24 and so forth, and the brand managers at Philip Morris,  
25 correct?

1 A That's correct.

2 Q During those five years, did you have  
3 discussions on a regular basis, meetings, conferences,  
4 communications, letters, et cetera, between yourself  
5 and brand managers for Player cigarettes and Benson &  
6 Hedges cigarettes?

7 A Yes.

8 Q And did you have regular communications  
9 with the brand managers for Philip Morris and their  
10 assistants?

11 A Yes.

12 Q During the five years you were at Wells,  
13 Rich, Ms. Lund, at any time, did you ever receive any  
14 request or instructions or inquiries from anyone at  
15 Philip Morris about how to make advertising for Benson  
16 & Hedges and Players oriented towards underaged  
17 smokers?

18 MR. WOBBROCK: Excuse me, counsel.  
19 Objection, hearsay.

20 MR. DUMAS: Your Honor, Philip Morris is  
21 the defendant in this case.

22 THE COURT: It might be hearsay, but  
23 sounds like it is good hearsay, so let's go ahead  
24 and proceed.

25 MR. TAUMAN: It's not a party admission,

1 Your Honor.

2 THE COURT: It's not an admission. We'll  
3 allow it at this time.

4 MR. TAUMAN: Thank you, Your Honor.

5 THE COURT: It's hearsay when you get down  
6 to the last exception, when they got the catchall,  
7 the Court is making the ruling on the catchall  
8 exception.

9 MR. DUMAS: The trustworthiness exception.  
10 Thank you, Your Honor. I'll restate my question.

11 THE WITNESS: Okay.

12 THE COURT: When there is no good reason  
13 for it and they want to give the Court the authority  
14 to let it in, that's the one I am going under.

15 Proceed, please.

16 BY MR. DUMAS:

17 Q Ms. Lund, I think this is an important  
18 matter I would like your attention to this question  
19 please. During the five years that you were at Wells,  
20 Rich, times that you regularly interacted with  
21 numerous Philip Morris employees, brand managers and  
22 their assistants, who are interested in successfully  
23 marketing Players and Benson & Hedges cigarettes, at  
24 any time did anyone at Philip Morris ever instruct you  
25 or request of you to prepare advertisements, or

1 marketing practices, that would appeal or attract  
2 underage smokers?

3 A Absolutely not.

4 Q During the five years that you were at  
5 Wells, Rich, did you have frequent meetings and  
6 conferences and work sessions with the creative people  
7 at Wells, Rich, the folks that were doing the drawings  
8 and photography and writing the copy and all that?

9 A Absolutely, sure.

10 Q At any time, Ms. Lund, do you recall any  
11 time when during your meetings with your fellow  
12 workers at Wells, Rich, with regard to Philip Morris  
13 products, Benson & Hedges and Players, to your  
14 recollection, your best memory, did the subject of  
15 creating ads that would appeal to underage folks ever  
16 come up?

17 A Never.

18 Q Are you sure about that?

19 A I am positive about that.

20 Q You indicated and you showed us the, "He  
21 said, she said" ad campaign that you said you were  
22 personally involved in that wasn't such a good  
23 campaign, right?

24 A Right.

25 Q Okay. What Benson & Hedges products

1       existed in the family or brand line if that is the  
2       right word, in 1985 or '84 or '85?

3           A       In 1985, there were full flavor  
4       cigarettes, there were light cigarettes and ultralight  
5       cigarettes.

6           Q       So it is your testimony that when you were  
7       at Wells, Rich, you were involved in the marketing for  
8       Philip Morris of their Benson & Hedges, among other  
9       things, their light and ultralight cigarettes?

10          A       Yes.

11          Q       This jury has heard some testimony about  
12       light cigarettes and ultralight cigarettes. My  
13       question to you is this: At any time, when you were  
14       working on Benson & Hedges, light cigarettes, Benson  
15       Hedges Ultralight cigarettes, for Wells, Rich in 1984  
16       and 1985, when you were meeting and interacting and  
17       working with the brand managers and their assistants  
18       at Philip Morris, for those light and ultralight  
19       products, were you ever given any instructions or  
20       requests that you would create advertising that would  
21       impliedly or explicitly suggest to smokers who were  
22       contemplating quitting that they ought to smoke Benson  
23       & Hedges Lights or Ultralights?

24          A       No.

25          Q       Did that ever come up?

1 A Absolutely not.

2 Q Same question with regard to that  
3 timeframe of Benson & Hedges Lights and Ultralights.  
4 Did you ever receive any instructions or requests or  
5 see any documents from the brand managers of Benson  
6 & Hedges, that Benson & Hedges Lights or Ultralights  
7 ought to be marketed as a safe cigarette?

8 A No, of course not.

9 Q Last question before we get into Merits.  
10 During our discussion just before the noon hour, you  
11 were discussing some of the changes that occurred at  
12 Philip Morris around the time when Mike Szymanczyk  
13 took over the helm, correct?

14 A Yes.

15 Q And you were talking, I think, about the  
16 leadership he provided in bringing about certain  
17 changes within the company, correct?

18 A That's correct.

19 Q Would you please be able to explain to us  
20 in some specific, concrete terms the kind of  
21 leadership that Mr. Szymanczyk helped bring to the  
22 company with regard to changes that you talked about  
23 earlier?

24 A Well, sure. You know, when Mr. Szymanczyk  
25 came to the company -- well, he came to the company a



1 lot of years before, but when he became the president  
2 of the company, I said to you that he created this  
3 mission statement for the company. And he took it  
4 very, very seriously.

5 And the mission statement says that we are  
6 to be the most responsible, effective and respected  
7 manufacturer, developer and marketer of consumer  
8 products made for adults. And our products are  
9 cigarette products. Our main product is cigarette  
10 products.

11 It's a long document. It has a lot of  
12 things related to stakeholders like smokers and  
13 society, and employees and shareholders and everybody,  
14 government and so forth. And all of those folks are  
15 listed on the mission statement. And on the back of  
16 the mission statement, it talks about our core values.

17 And there are five of those and he  
18 enumerates what the core values are of the company.  
19 And I think a lot of companies have those. A lot of  
20 them, they put them in little cubes and they put them  
21 on everybody's desk. That's not what Mr. Szymanczyk  
22 did. He got with us and we, as a team, went and  
23 talked to everyone, every single person in our company  
24 about the mission statement and how important the  
25 mission statement was to our future.

1           He put it in our performance appraisals,  
2       so that we're held accountable for the mission  
3       statement and live up to everything that is written in  
4       the mission statement. So every year we're evaluated  
5       based on whether we lived up to what is in the mission  
6       statement. That is one example.

7           Let me see, another example would be he  
8       encouraged us, my colleague, Mr. Johnson and me, for  
9       example, to go above the letter of the Master  
10      Settlement Agreement. And he said, "If we are going  
11      to be the most responsible, then we need to do maybe  
12      even more than we've already agreed to in the Master  
13      Settlement Agreement," so we've made changes the way  
14      we run our advertising, made changes in how we  
15      approach the retailers, how we market our products to  
16      retailers.

17           That was another thing that he did, and  
18      really encouraged us to think about what those words  
19      mean, and get above, even all the regulations that  
20      exist for us. That was the second thing.

21           Q       What is the Master Settlement Agreement?

22           A       What is the Master Settlement Agreement?

23           Q       Yes.

24           A       The Master Settlement Agreement is the  
25      agreement that the major manufacturers made with the

1 States' Attorneys General across the United States to  
2 stop the lawsuits relative to our practices and put in  
3 place some guidelines and some enforcement about how  
4 we market our products. That's the thumbnail of it.

5 Q We'll be talking more about that later.  
6 Go ahead.

7 A I think there is one more example, I think  
8 it is an important one, that is that Mr. Szymanczyk  
9 has really, really pushed us and is pushing us to see  
10 if we can accelerate our development of a product that  
11 has or may have some reduced risk associated with it.  
12 And we are working furiously on it.

13 Q Is that the SCoR Project?

14 A Yes.

15 Q All right. Let's go back in time now to  
16 1985, when you joined Philip Morris.

17 A Okay.

18 Q What was your first position with Philip  
19 Morris again?

20 A I was the brand manager for Merit  
21 cigarettes.

22 Q And, again, briefly what did you do as a  
23 brand manager for Merit cigarettes?

24 A Well, the brand manager is responsible for  
25 figuring out what the market wants, and to writing a

1 marketing plan with the strategies and making sure  
2 that plan is implemented through the agencies and  
3 through the sales force and so on.

4 Q What is a marketing plan?

5 A Well, it's a document, a presentation  
6 sometimes, which talks about all aspects of the brand.  
7 It talks about its performance in the marketplace, so  
8 it tells a lot about whether the brand is doing well  
9 in the marketplace or whether it's not doing well in  
10 the marketplace.

11 And tries to answer why it is doing well  
12 or not doing well. Talks about the audience for the  
13 products and looks at the demographics of the brands,  
14 so we understand if it is men who are smoking or women  
15 or both and about what their ages are, those kinds of  
16 things, where they live, education, the number of  
17 things that we look at in terms of demographics.

18 And then it looks at competitors, what  
19 they are doing. It looks at our advertising. And  
20 then it says for all the strategies that we want to  
21 have guide the brand in the coming year, and it  
22 outlines all of the strategies and outlines all of the  
23 plans and programs so that we know and everybody knows  
24 what we're going to do on Merit cigarettes in the  
25 coming year.

1 Q When you were at Philip Morris, did you  
2 work on brand plans for Merit cigarettes?

3 A Yes.

4 Q When you were given the assignment of  
5 being the brand manager for Merit cigarettes in 1985,  
6 did you take that opportunity to review the history of  
7 Merit cigarettes?

8 A Yes, I sure did.

9 Q What did you do?

10 A I went back and looked at the marketing  
11 documents that were in the files, I looked at the  
12 advertising that was created for Merit. I talked to  
13 all of the people who were still in the company who  
14 worked on creating Merit cigarettes so I learned  
15 everything that I could about what happened before I  
16 got there.

17 Q Why did Philip Morris create Merit  
18 cigarettes?

19 A Well, it created Merit cigarettes because  
20 we saw in the marketplace, a growing demand for  
21 low-tar cigarettes, and I think specifically we saw a  
22 demand in the marketplace for low-tar cigarettes that  
23 tasted good, which didn't seem to be in the  
24 marketplace.

25 MR. WOBBROCK: Excuse me, Mrs. Lund --

1 MR. DUMAS: Is this an objection?  
2 MR. WOBBROCK: I have a question in aid of  
3 objection if I might, Your Honor.  
4 THE COURT: Proceed, please.  
5

## QUESTIONS IN AID OF OBJECTION

6  
7  
8 BY MR. WOBBROCK:  
9 Q You didn't start working at Philip Morris  
10 until 1985?  
11 A 1985.  
12 Q Merits came out in '76; is that right?  
13 A That's correct.  
14 Q All right. So what you're testifying to  
15 now is not first-hand knowledge, but is, instead,  
16 based upon what you've heard or have been told. It is  
17 not anything you experienced, is it?  
18 A I was not in the company in 1976.  
19 MR. WOBBROCK: Objection for reasons we  
20 previously stated, Your Honor.  
21 MR. DUMAS: May I be heard, Your Honor?  
22 This witness testified that as part of her job she  
23 personally reviewed documents concerning Merit  
24 cigarettes, why they were created, how they were  
25 marketed and so forth. I think she is entitled to

1 tell the jury what she did in 1985, and what she  
2 learned. She is not giving any opinions,  
3 Your Honor.

4 THE COURT: The Court believes it is a  
5 historical fact. That's the reason they started  
6 doing it. She can testify to that as long as she is  
7 not giving her opinion about why they did it.

8 Proceed, please.

9 MR. DUMAS: Thank you.

10 BY MR. DUMAS:

11 Q Ms. Lund, I want to restrict my questions  
12 regarding what you learned in reviewing documents  
13 concerning Merit cigarettes, okay?

14 A Okay.

15 Q All right. Now, back to my question. I  
16 think you started your answer and I don't recall where  
17 you were in it. I think you said something to the  
18 effect that there was a demand for low-tar cigarettes  
19 that tasted good?

20 A That's correct.

21 Q Go ahead.

22 A I forget the question. Sorry.

23 Q All right, fair enough. Well, let's just  
24 pick up with that. Based on the documents that you  
25 saw, Ms. Lund, what was the reason for the demand in

1 low-tar cigarettes that tasted good?

2 A Well, at that time the public health  
3 community and the government was encouraging smokers  
4 who didn't want to quit to choose a lower-tar  
5 cigarette. And I think that is why the demand arose  
6 during that time.

7 Q Were there low-tar cigarettes on the  
8 marketplace prior to 1976?

9 A Yes.

10 Q Did you review research concerning  
11 consumers' response to those products?

12 A Yes.

13 Q And was there an issue concerning consumer  
14 acceptability of many of the low-tar products that  
15 were on the market in the late '60s and early '70s?

16 A Yes.

17 Q What was that issue?

18 A Well, they wanted the products, but they  
19 didn't taste good, so they didn't want them. They  
20 wanted something that tasted good.

21 Q Did Philip Morris do research regarding  
22 how many smokers had tried low-tar cigarettes in the  
23 late '60s and early '70s, but rejected them?

24 A Yes.

25 Q What did you find?



1           A       My recollection is that nine out of ten  
2 people who tried low-tar cigarettes rejected them.  
3           Q       Why did they reject them?  
4           A       Because they didn't taste good.  
5           Q       Now, at the time that Merit was introduced  
6 in 1976, which was about nine years before you came to  
7 the company, correct?  
8           A       That's correct.  
9           Q       To your knowledge, Ms. Lund, did Philip  
10 Morris have any other low-tar cigarettes on the  
11 market?  
12          A       Yes.  
13          Q       Before Merit?  
14          A       Yes.  
15          Q       What did they have?  
16          A       They had Marlboro Lights, and they might  
17 have had a couple others. I am not positive, though.  
18          Q       What is your understanding when you  
19 arrived at Philip Morris as to how long it had taken  
20 to develop the Merit cigarette within Philip Morris?  
21          A       My understanding, my recollection is that  
22 it took -- it took at least a decade to develop Merit  
23 cigarettes.  
24          Q       Why did Philip Morris spend a decade  
25 creating the Merit cigarette?

1           A       Well, I think it wanted to make a really  
2       good cigarette.

3           MR. WOBBROCK: Your Honor, this is way  
4       beyond her expertise.

5           THE COURT: I think that is an opinion  
6       there. I will strike the question and answer.

7           Proceed to your next one, counsel.

8           MR. DUMAS: All right.

9       BY MR. DUMAS:

10          Q       After Philip Morris created the Merit  
11       cigarette was that cigarette tested with smokers?

12          A       Yes.

13          Q       For its acceptability?

14          A       Yes.

15          Q       Okay. Tell us about how that was done and  
16       what the result was?

17          A       There was a lot of research that was  
18       conducted behind the Merit cigarettes and I know that  
19       our Richmond folks actually tested the product on a  
20       blind basis, where they would send it to smokers and  
21       they wouldn't tell them it was Merit. They were in  
22       white packs and asked them how to it tasted compared  
23       to other low-tar cigarettes.

24                 And I know that we also did extensive  
25       testing with an outside company on the same kind of

1 work to really test whether this product, not knowing  
2 anything about it, but whether this product and the  
3 product alone really tasted that much better than  
4 other low-tar cigarettes on the market.

5 Q Why was blind taste testing done?

6 A Well, blind taste testing is done so that  
7 you don't -- it is not about the name of the product  
8 or what you say about the product. It is just purely  
9 to understand if the product delivers something. And  
10 then we also needed to do that because we were going  
11 to talk about that in our advertising.

12 Q Now, in reviewing the Merit documents,  
13 were there -- was there factual information concerning  
14 what I called previously the demographics of Merit  
15 smokers?

16 A I'm sorry, would you repeat that?

17 Q Sure. In reviewing the Merit documents  
18 that you did in 1985 when you become brand manager,  
19 did you get an understanding of demographics of the  
20 profile of Merit smokers?

21 A Yes.

22 Q Tell us about that.

23 A My recollection in that time, again, like  
24 Benson & Hedges, Merit was a brand that was smoked by  
25 both men and women, maybe between 45 percent men and

1 55 percent women, or 47/52, something like that.  
2 Almost 50/50, men and women. I think they tended to  
3 be a bit older, maybe not quite as old as Benson  
4 & Hedges, but in the 25-to-45-year-old age segment.  
5 I think they tended to have more college  
6 education. I think they had maybe a higher income  
7 than some other cigarette brands. Those are some of  
8 the things that I remember about it.

9 MR. DUMAS: No. 11, counsel.

10 BY MR. DUMAS:

11 Q I'd like to show you a few Merit ads  
12 Ms. Lund. "Merit solving smoker dilemma, enrich  
13 flavor breakthrough in search for low-tar, good taste  
14 cigarette." Is that what the copy says?

15 A That's exactly what it says.

16 Q Now, this is a Merit ad from 1978. Is  
17 that about right?

18 A That's about right.

19 Q Okay. Have you had occasion to review the  
20 Merit ads in 1985, did you go through and read the  
21 previous ads?

22 A Sure.

23 Q Is this style of the ad, is that the kind  
24 of -- generally the kind of advertising that Merit  
25 generally used in the '76 to '85 timeframe?

1 A Yes.

2 Q The when you read these ads, Ms. Lund, in  
3 1985, did you see anything in there that told smokers  
4 that Merit cigarettes were safe cigarettes?

5 A No, I don't think there is anything in  
6 there that says that Merit cigarettes are safe  
7 cigarettes, I think.

8 Q Did you see any Merit ad that did not have  
9 the Surgeon General warning as required by law?

10 A No. All of our ads carried the Surgeon  
11 General's warning.

12 Q Did you see any Merit ad that did not  
13 contain the tar and nicotine numbers as required by  
14 the FTC?

15 A No, I don't recall ever seeing one. They  
16 all have to carry it.

17 Q The copy talks about enriched flavor?

18 A Yes.

19 Q Is that a phrase that was used at Philip  
20 Morris?

21 A Yes.

22 Q What does that mean?

23 A Well, it's the process that was created --  
24 I think there is a little TM next to it, trademark.

25 MR. WOBBROCK: Objection, Your Honor.

1 Again, this witness is not a chemist. She is an  
2 advertising person. She is now just repeating what  
3 is in the ad. It is impossible for her to have a  
4 qualified opinion about the subject. She wasn't  
5 even there at the company at the time.

6 THE COURT: Sustained.  
7 Proceed, please.

8 BY MR. DUMAS:

9 Q Ms. Lund, from the time that you have been  
10 involved in cigarette advertising, have cigarette  
11 advertisements been regulated by the FTC?

12 A Yes.

13 Q What is the FTC?

14 A The Federal Trade Commission.

15 Q Does Philip Morris have employees whose  
16 sole job it is to review ads like the Merit ad and  
17 your other advertisements to ensure that the ads  
18 comply with the requirements of the FTC?

19 A Yes, we do.

20 Q Let's talk a little bit about those  
21 requirements as you understand them to be. What is  
22 required to be placed in the ad by the FTC?

23 A Well, there are two things that are  
24 required to be placed. One is the warning, the  
25 Surgeon General's warning, and that is required to be

1 placed on every ad. That's what is in the box. Also  
2 what is required is to report the tar and nicotine  
3 numbers for the cigarette based on the information  
4 provided by the FTC. Both of those things are  
5 required on all ads.

6 Q Ms. Lund, in you're working at Philip  
7 Morris and your experience at Philip Morris, can  
8 Philip Morris put any other tar and nicotine numbers  
9 in those ads?

10 A No, we can't. We have to use those tar  
11 and nicotine numbers.

12 Q Does Philip Morris have the freedom not to  
13 put any tar and nicotine numbers in its ads?

14 A Absolutely not.

15 Q Are there people at Philip Morris whose  
16 job it is to ensure that the size and location of the  
17 Surgeon General's warning and the FTC tar and nicotine  
18 numbers are the right size and in the right place?

19 A Yes, we have folks who do that.

20 Q Tell us a little bit about that process  
21 and how it is done.

22 A Well, there are a number of people who  
23 have to sign off on this. So when the ad agency sends  
24 over the ad, before it get placed in any magazines, it  
25 has to be checked.

1           And the brand manager has to sign that the  
2       ad is in order, that the warning box is on and tar and  
3       nicotine number is on. And then we have a group of  
4       people who actually have a book to be certain that the  
5       exact warning box, the exact size the exact T and N  
6       are on the ads. They are the double checkers.

7           They are the ones who really know exactly  
8       which warning and which T and N, tar and nicotine line  
9       has to be on one. And then there is a third check  
10      point, which is our legal department, looks at it to  
11      be sure that neither of the other two forgot anything.

12           Q       I'm sorry, what?

13           A       That the other two didn't forget anything.

14           Q       The rules and regulations and so forth,  
15      are there just a couple of them or are there a whole  
16      bunch concerning where the warnings have to be in size  
17      and location?

18           A       I think there are a dozen or more. There  
19      is a huge book that outlines all of it.

20           Q       Now, did you prepare a demonstrative that  
21      summarizes some of the additional limitations on the  
22      way that Philip Morris can advertise its product?

23           A       Yes.

24           Q       Would that be helpful to the jury --

25           A       I think it would.



1 Q -- in explaining your testimony?  
2 MR. WOBBROCK: Can I look at it first,  
3 counsel?  
4 MR. DUMAS: No. 13.  
5 MR. WOBBROCK: No objection.  
6 THE COURT: All right. Proceed, please.  
7 BY MR. DUMAS:  
8 Q The first one says, "No health claims."  
9 Ms. Lund, you have a monitor in front of you as well  
10 so whichever one works best for you.  
11 A Okay.  
12 Q What does that mean to you and Philip  
13 Morris?  
14 A Well, we are not committed to put any  
15 health claim in our advertisements. And we haven't  
16 been able to do that since the 1950s.  
17 Q The next one says, "No ads in publications  
18 directed to those under 21."  
19 What does that mean to you and Philip  
20 Morris, Ms. Lund?  
21 A Well, that means we are required to place  
22 our ads in magazines that are really for adults, for  
23 people over the age of 21. That's what that means.  
24 Q Are there guidelines with regard to what  
25 constitutes a publication to those under 21?

1 A We have guidelines, yes.

2 Q Tell us a little bit about those.

3 A Well, I think the way -- we ask the  
4 publisher of the magazine to certify that the magazine  
5 is for adults, primarily for adults; and, secondly, we  
6 ask him to provide support for that, to provide us  
7 their circulation and subscription date and we look at  
8 all of the numbers that they send us and we make sure,  
9 I think it's 85 percent of the publication must be  
10 over the age of 21, 85 percent.

11 Q And just thinking here with regard to from  
12 1985 to 1995 or so, during that general time frame,  
13 what are the some of the types of publications that  
14 Philip Morris could not and would not advertise in?

15 A Oh, well, we didn't advertise in magazines  
16 like Seventeen magazine and Teen magazine. I don't  
17 know the names very well, but they come to mind.

18 Q The next one concerns the people who are  
19 in the ads regarding their age and their appearance;  
20 is that right?

21 A That's correct.

22 Q What does that mean?

23 A That means when we create our advertising  
24 we have to be sure that any person that appears in our  
25 ad has to actually be 25 years of age. We have to

1 have that signed. And they can't appear to be under  
2 the age of 25, so not just a young-looking 25, we have  
3 to have people who look 25 and older.

4 Q And are 25?

5 A And are 25.

6 Q The next one concerns activity within the  
7 ads. Is that what that is about?

8 A Yes.

9 Q Okay. What does that mean and how does  
10 that restrict your advertising, Ms. Lund?

11 A It just means that we can't have -- we  
12 can't show people playing football or something like  
13 that in our advertising.

14 Q The next one concerns celebrities and  
15 sports testimonials. What is that about?

16 A Well, it means that we can't have athletes  
17 or celebrities provide -- say, "Well, this is a great  
18 cigarette, so try it."

19 Q The last four we've been talking about,  
20 how long have those been in effect, "No ads in  
21 publication models and athletic" --

22 A Those have all been in effect since 1964.

23 Q Okay. The third one from the bottom, "No  
24 TV or radio advertising."

25 Did there come a point in time when TV

1 advertising was no longer allowed?  
2 A Yes.  
3 Q When was that?  
4 A 1971.  
5 Q And the second one concerns the tar and  
6 nicotine numbers. I think we already talked about  
7 that. How long has that be required, to your  
8 understanding, Ms. Lund?  
9 A I think that, too, was in the early '70s,  
10 maybe '71.  
11 Q And then lastly, the Surgeon General  
12 warnings on all your advertisements in addition to the  
13 packs in terms of advertising.  
14 A In terms of the ads, I think in the early  
15 '70s also, maybe '71.  
16 Q Do you think these controls and  
17 limitations are a good thing?  
18 A Yes, I do.  
19 Q Do you think by themselves they go far  
20 enough?  
21 A Well, I think we've gone beyond them and I  
22 think our intent is to go beyond them.  
23 Q We'll talk more about that later.  
24 Now, you compiled a packet of Merit  
25 advertisements for us. Do these fairly and accurately

1 sample some of the many Merit ads that have run  
2 between 1976 and 1990 or so?  
3 A Yes.  
4 Q And the jury is going to have a -- have an  
5 opportunity to go through those. They'll be offered  
6 into evidence. I am not going to take the time to go  
7 through all of them now. And, of course, there are  
8 more of them. This is not all of them?  
9 A I don't think so.  
10 Q And these are all print ads; is that  
11 correct?  
12 A Yes.  
13 Q Merit never appeared on radio or  
14 television?  
15 A No, it didn't.  
16 Q And you've reviewed these ads?  
17 A Yes, I have.  
18 Q Do any of these ads in their copy say that  
19 Merit cigarettes are not dangerous?  
20 A No.  
21 Q Do think of these advertisements say that  
22 Merits are a safe cigarette?  
23 A No, it doesn't say that it's a safe  
24 cigarette.  
25 Q Do any of these ads say that Merit, as a

1 low-tar cigarette, causes less cancer?

2 A No, it doesn't say that.

3 Q Do any of these ads say that Merit as a  
4 low-tar cigarette is not habit forming or addictive?

5 A No, it doesn't say that either.

6 Q And, finally, do any of these Merit ads  
7 say people who are thinking about quitting should  
8 smoke Merit instead?

9 A No, it doesn't say that.

10 MR. DUMAS: I would move into evidence  
11 Defendant's 2411.

12 MR. WOBBROCK: Your Honor, we would like  
13 to take that up later.

14 THE COURT: Very well.

15 BY MR. DUMAS:

16 Q Ms. Lund, you talked about the public  
17 health community's message concerning smokers who were  
18 smoking full-flavor cigarettes. And if they didn't  
19 quit, they ought to consider switching to a low-tar  
20 cigarette, correct?

21 A That's correct.

22 Q When you were at Philip Morris, as a  
23 layperson did you hear that message?

24 A Yes.

25 Q From your discussions and from your

1 working in Philip Morris in the marketing department  
2 as a layperson, did you have an understanding about  
3 low-tar cigarettes?

4 A Well, I had that understanding. I had the  
5 understanding that the public health community talked  
6 about, which was if you were going to smoke that you  
7 might want to think about these low-tar cigarettes.

8 Q You've been intimately involved and are  
9 now responsible for Philip Morris' advertising for 17  
10 years, right?

11 A Well, not all of it. But I've been there  
12 for 17 years.

13 Q You've been involved in advertisements for  
14 low-tar cigarettes, right?

15 A Correct.

16 Q Full-flavor cigarettes?

17 A Yes.

18 Q Ultra-low cigarettes?

19 A Yes.

20 Q And you've been responsible for some of  
21 these low-tar cigarettes and ultra low-tar cigarettes  
22 that exist in this country for the last 15 years. You  
23 have been involved in some of that, right?

24 A That's correct.

25 Q Okay. During that period of time,

1 Ms. Lund, when you were representing some of Philip  
2 Morris' low tar and ultra low-tar products as low tar  
3 and ultra low-tar products, did you believe that you  
4 were defrauding the American people?

5 A I don't think we were defrauding the  
6 American people. We were offering low tar and light  
7 and ultra low-tar cigarettes.

8 Q What did you think you were doing?

9 A I think we were offering what the public  
10 health community and the government asked us to do and  
11 we were providing smokers with what they wanted.

12 Q You believe you were providing smokers  
13 with some means of information to identify low-tar  
14 cigarettes and ultra low-tar cigarettes?

15 A Oh, absolutely.

16 Q Why do you say that?

17 A Well, because there was a way to  
18 distinguish between the cigarettes and that's part of  
19 why we called them those names.

20 Q I want to briefly focus your attention on  
21 Cambridge cigarettes?

22 A Okay.

23 Q We've heard some testimony about Cambridge  
24 cigarettes. Are you generally familiar with Philip  
25 Morris' efforts to market Cambridge cigarettes?



1 A Yes.

2 Q Do you have a general understanding or a  
3 specific understanding of how much money Philip Morris  
4 spent in trying to market the Cambridge cigarette  
5 approximately?

6 A Well, you mean like in the 1980s?

7 Q Yes, ma'am.

8 A I think that it spent a considerable  
9 amount of money. I think it was 50 or \$60 million  
10 maybe a year.

11 Q Was the Cambridge cigarette successful the  
12 ultra low Cambridge cigarette?

13 A It was not very successful, no.

14 Q If the ultra low Cambridge cigarette had  
15 been successful in the marketplace, would Philip  
16 Morris have continued to make it and continued to  
17 advertise it?

18 A Oh, sure.

19

20 QUESTIONS IN AID OF OBJECTION

21

22 BY MR. WOBBROCK:

23 Q Just a second. Ms. Lund, were you there  
24 then?

25 A I was with the company beginning in 1985,

1 and I was with Wells, Rich & Greene on Philip Morris  
2 business in 1980.

3 Q Were you at --

4 A No, I came to Philip Morris in 1985.

5 Q That is after the Cambridge cigarette was  
6 marketed?

7 A Well, it is still being marketed today.  
8 You mean the lowest? It was marketed in the early  
9 1980s, up to about 1984.

10 Q So you started at Philip Morris  
11 afterwards?

12 A That's correct.

13 MR. WOBBROCK: Same objection, Your Honor.  
14 Beyond this witness' expertise and experience.

15 MR. DUMAS: Your Honor, this witness is a  
16 representative of Philip Morris. She testified that  
17 she was familiar generally with the marketing of the  
18 Cambridge cigarette. She is not offering any  
19 opinions. She is simply offering her understanding.

20 THE COURT: Overruled.

21 Proceed, please.

22 BY MR. DUMAS:

23 Q Was Cambridge cigarette, the ultra low  
24 Cambridge cigarette that we heard about, was it  
25 popular with your customers?

1           A       Well, no. It didn't have very much market  
2       share.

3           Q       Do you know why?

4           A       Well, I guess it didn't taste good enough,  
5       or they didn't want that ultra low-tar product.  
6       Something was wrong, because they weren't choosing it.

7           MR. WOBBROCK: Objection, Your Honor. She  
8       said she guessed. She wasn't there and now she is  
9       just speculating.

10          THE COURT: All right. Proceed, counsel.

11          MR. DUMAS: Thank you.

12       BY MR. DUMAS:

13          Q       With regard to the market share that the  
14       Cambridge low cigarette obtained, what kind of numbers  
15       did it obtain?

16          A       Well, I think it got as high as a .3 of  
17       the market share and fell to a .1, which means that  
18       one-tenth of one-percent of the smokers in the United  
19       States were smoking it. That's very low.

20          Q       Was the lowest Cambridge a successful or  
21       unsuccessful brand for Philip Morris?

22          A       I would have to call it unsuccessful.

23          Q       Now, after Philip Morris introduced the  
24       Merit cigarette in 1976, did it subsequently introduce  
25       brand extensions of the Merit cigarette?

1 A Yes.

2 Q Okay. Tell us about those.

3 A It introduced Merit Ultralights in the  
4 early 1980s, and later in the '80s, it introduced  
5 Merit Ultra and it tested Merit De-Nic.

6 MR. DUMAS: No. 14, counsel. I honestly  
7 can't represent to you you have.

8 THE COURT: Proceed, please.

9 MR. WOBBROCK: What's the number?

10 MR. PHILLIPS: 14.

11 BY MR. DUMAS:

12 Q Now, with the Merit filters, introduced in  
13 the 1976, I think you said the ultralights were  
14 introduced in 1981?

15 A '81 or '82.

16 Q And the Ultima around 1992, right?

17 A I thought it was the late '80s, but I  
18 think you're right, it was in the early '90s.

19 Q Okay. When you develop sister products,  
20 or whatever the right term is, what do you do? What  
21 is the point of that generally and what it is called?

22 A It is called line extensions. And what it  
23 means is if you have a main brand, over time people  
24 get to know what that name brand stands for. In  
25 Merit's case, it is low tar and enriched flavors and

1 it says it on the back. What one tries to do is all  
2 that built up over time so people know what Merit  
3 stands for, you try then to apply it to other  
4 variations of the brand, like Merit Ultralights and  
5 Merit Ultima.

6 Q And we can see that the line extension  
7 cigarettes, Ultralights and Ultimas were progressively  
8 contained less tar and nicotine as measured by the FTC  
9 method?

10 A That's correct.

11 Q Were the Ultralights and Ultimas created  
12 to compete with other cigarettes, specific cigarettes?

13 A Yes. There were other ultra low-tar  
14 cigarettes on the market.

15 Q What are some of those?

16 A I think like Now and Carlton were two  
17 brands that were pretty popular then.

18 Q Those are non-Philip Morris brands?

19 A Yes.

20 Q Now, are you generally familiar about the  
21 market share of Merit cigarettes and the line  
22 extensions?

23 A Yes.

24 Q What happened to the market share of Merit  
25 filters, when the Ultralights were introduced in 1981?

1           A       Well, the Merit filter cigarettes started  
2 to go down and the Merit Ultralights started to go up  
3 and today Merit Ultralights are actually bigger than  
4 Merit filters.

5           Q       When you say bigger, let's see what the  
6 whole thing is. All right. You mentioned -- let me  
7 back up -- never mind. All right. Let me back up.

8                   What about the Ultimas? What kind of  
9 market share do the Ultimas have?

10          A       Well, they have a pretty low market share.  
11 I guess it would be today a little under .2 percent,  
12 so two-tenths of one percent. So it is only about  
13 today 10 percent of all of Merit's business is in  
14 Merit Ultralight.

15          Q       Now, you talked -- you mentioned that the  
16 some of these cigarettes Merit was marketed or at  
17 least test marketed, you might have used that term, as  
18 De-Nic cigarettes; is that correct?

19          A       That's correct.

20          Q       Was the De-Nic cigarette was introduced in  
21 the test market while you were at Philip Morris?

22          A       Yes.

23          Q       About when did that occur?

24          A       I recall that to be in the late 1980s.

25          Q       Now, we heard testimony already concerning

1 the technical process that Philip Morris used to take  
2 the nicotine out, and we're not going to go through  
3 that again. And we heard testimony regarding -- I  
4 want you to assume we've heard testimony regarding  
5 that. And with regard to the factory that was built  
6 in anticipation of this product, are you familiar  
7 with -- in general terms with the test marketing of  
8 the De-Nic cigarettes?

9 A Yes.

10 Q First of all, why don't you tell us a  
11 little bit about what the purpose is of a test market?

12 A Well, in the case of De-Nic, what we put  
13 out into the test market was more than one variation.  
14 We put out a product called Next in some test markets  
15 and in other test markets, Merit De-Nic. We weren't  
16 sure which one was better, whether a new name called  
17 Next or Merit De-Nic was better or frankly if either  
18 one of them would be appealing to smokers in America.

19 Q And so what happens in a test market  
20 program? What do you do?

21 A Well, you go and place the product. You  
22 get the product in distribution and you have it retail  
23 and you run advertising for it. You measure to see if  
24 smokers are trying it. And you measure to see if  
25 they're switching to it. And then you measure to see

1 if then they are going to stay with that Merit De-Nic.

2 Q In how many test markets, different  
3 cities, what were the De-Nic cigarettes tested at?

4 A We had six or seven test markets.

5 Q Why was Merit picked as one of the brands  
6 to run -- to be tried as De-Nic?

7 A Well, I think for two reasons. I said  
8 before, you know how you took what has been built up  
9 behind Merit was this idea of a cigarette that had  
10 good flavor and a lot of science was involved in  
11 creating that enriched flavor process. So I think it  
12 was trying to borrow that Merit name and heritage as  
13 one option in looking at the De-Nic product.

14 Q Approximately, how much money did Philip  
15 Morris spend in the marketing side of the De-Nic  
16 project?

17 A Well, in those test markets, we spent  
18 around a total of \$36 million, so 6 or \$7 million in  
19 each one of the test markets.

20 Q Was the marketing and promotion of the  
21 De-Nic cigarette, was it -- did you use all the tools  
22 available to you as marketers?

23 A Absolutely.

24 Q What did you do?

25 A We used magazine advertising, we used



1 newspaper advertising, we used point-of-sale  
2 distribution and signs at retail, those kinds of  
3 things.

4 Q You brought a sample of one of those ads;  
5 is that right?

6 A I think I did, yeah.

7 MR. DUMAS: No. 15.

8 MR. PHILLIPS: I think that maybe -- let  
9 me see if I can help you.

10 MR. DUMAS: Excuse me, Your Honor. Okay.

11

12 MR. TAUMAN: I'm sorry, yes.

13 MR. DUMAS: Thank you.

14 BY MR. DUMAS:

15 Q It's a really bad copy, Ms. Lund. So I am  
16 not going to spend much time with that. I don't know  
17 if you can even read it, it is so washed out, but this  
18 is an example of at least one of the Merit De-Nic ads?

19 A Yes, it is.

20 Q What kind of market share was the De-Nic  
21 cigarette able to achieve in these test markets?

22 A My recollection is that it was almost too  
23 small to measure. I don't know if it achieved  
24 one-tenth of one percent. It may have, but it was  
25 really too small to follow.

1 Q Did the De-Nic make it past the test  
2 market phase?

3 A No, it did not.

4 Q Earlier you talked about brand plans. Can  
5 you explain to the jury a little bit about what those  
6 are. Are brand plans unique to the cigarette  
7 business?

8 A No, they're not.

9 Q Tell us about that.

10 A Well, I think everybody who works in  
11 marketing or at least most packaged goods businesses  
12 like when I worked on Safeguard soap or Sure deodorant  
13 those brand managers would create marketing plans.  
14 They are kind of like blueprints for what is going to  
15 happen to a brand in the coming year, so it is a very  
16 common practice.

17 Q How are brand plans developed during the  
18 time you've been there?

19 A Well, the brand manager has to gather lots  
20 and lots of information and has to understand all of  
21 the performance of the brand, understand whether the  
22 shares are going up or down. It has to understand the  
23 audience. It has to understand who the smokers are.  
24 It has to understand any research that has been  
25 conducted among that audience, what are smokers saying

1 about Merit cigarettes.

2 What are competitive smokers, what are  
3 Vantage smokers saying about Merit cigarettes? And  
4 then it has to say, "Well, now that I looked at all of  
5 that, this is what I think we should do for Merit  
6 cigarettes," for example. It writes down what the  
7 goals are, what the strategies are. It writes down  
8 what the programs are. And then it has to be sure,  
9 well, that's -- you asked me what a brand plan was.  
10 That's what a brand plan is.

11 Q How many people at Philip Morris does it  
12 take to put together a brand plan and marketing  
13 campaign for a cigarette?

14 A Well, I think to create the brand plan, it  
15 depends on how big the brand is and how complicated  
16 the plan is. It could take several people or it could  
17 take 10 or 20 people. It certainly takes many, many  
18 more people to implement the plan than to write the  
19 plan.

20 Q Now, are you familiar with the Merit brand  
21 plan?

22 A Yes, I've seen Merit brand plans.

23 Q I am going to hand you what is marked  
24 Defendant's Exhibit 1173. Is that a document you are  
25 generally familiar with?

1           A     Yes, it is.  
2           Q     What is it?  
3           A     It's the Merit 1991 brand plan.  
4                 MR. DUMAS: Thank you, I will offer 1173.  
5                 MR. WOBBROCK: Your Honor, we'd like to  
6           speak to the Court about this at another time.  
7                 THE COURT: All right, we'll do so.  
8                 Proceed, please.  
9   BY MR. DUMAS:  
10          Q     Is this a technical brand plan, Ms. Lund?  
11          A     Yes, it is.  
12          Q     Do brand plans provide an inside view of  
13   the marketing strategy for Merit cigarettes?  
14          A     Yes, it does.  
15          Q     Does the brand plan contain the entire  
16   blueprint or the entire road map for the marketing of  
17   the brand?  
18          A     Yes.  
19          Q     What do you mean by that?  
20          A     Well, I mean that the brand manager has to  
21   write down in this plan what he or she wants to do  
22   with the brand in the coming year and oftentimes it  
23   even includes the budgets.  
24          Q     Now, the jury hopefully will have that  
25   document to review at a later point in time. And I'm

1 not going to take the time to go through it. It is  
2 quite thick.

3 Ms. Lund, is there anything in that Merit  
4 brand plan that talks about marketing strategies to  
5 convince folks not to quit smoking cigarettes?

6 A No, there isn't.

7 Q Is there any marketing strategies  
8 contained in that brand plan to convince folks through  
9 your marketing that smoking Merit cigarettes is safe?

10 A No, there is not.

11 Q Is there anything in the brand plan to  
12 develop marketing strategies, to try to sell  
13 cigarettes to kids?

14 A No, there is not.

15 Q And is there any -- strike that one.

16 Let's talk a little bit about budgets,  
17 advertising budgets. Since you've been at Philip  
18 Morris, what has been the general rate of percentage  
19 of adult smokers in this country who smoke cigarettes?  
20 Has it gone up, down or stayed the same?

21 A The number of people smoking in the United  
22 States is going down. It has steadily gone down.

23 Q Tell us about that.

24 A Well, I think in the last 20 years it has  
25 gone down I think at least 20 percentage points. It

1 is about 23 percent of adults smoke in the United  
2 States today.

3 MR. DUMAS: No. 16.

4 MR. WOBBROCK: No objection.

5 THE COURT: All right, proceed please.

6 BY MR. DUMAS:

7 Q And does this demonstrative show in  
8 general terms the decline in the percentage of  
9 Americans who smoke cigarettes?

10 A I had it wrong. I said 20 years, but  
11 actually the chart goes all the way back to 1965.

12 Q Okay. Now, given that I want to talk  
13 about another side of that equation which would be  
14 numbers of cigarettes sold, okay, are you generally  
15 familiar with what that has done since you have been  
16 at Philip Morris?

17 A Yes.

18 Q In terms of the overall number of  
19 cigarettes sold in this country?

20 A Yes.

21 Q Tell us about that.

22 A Well, it's declined.

23 Q From what to what in round numbers?

24 A Well, if you take a 17-year period or  
25 close to it, I think about 600 billion cigarettes were

1 sold about 20 years ago in this country, and today  
2 about 400 billion cigarettes are being sold in the  
3 United States.

4 Q Does that fundamental fact, the declining  
5 market, does that have an impact on how cigarettes are  
6 marketed in this country by Philip Morris?

7 A Yes.

8 Q Tell us about it.

9 A Well, it means you know, the market is  
10 declining. And the market has been declining for a  
11 very long time. So our job as brand managers and  
12 marketers, is to say, here is the market. And here  
13 are adult smokers and our job is to see if we can  
14 convince people to switch from the competitors'  
15 cigarettes to our cigarettes.

16 And I think maybe even these days it's  
17 more important to be sure that our smokers don't  
18 switch to competitors' cigarettes.

19 Q And since you have been at Philip Morris,  
20 has Philip Morris been successful in getting folks to  
21 switch from the other guys' brands to your brands?

22 A Yes, we have.

23 Q Tell us about that.

24 A Well, I mean, we have had growing market  
25 shares and for Philip Morris brands about 50 percent

1 of the smokers choose one Philip Morris or another, a  
2 little bit more than 50 percent, maybe 51 percent,  
3 choose a Philip Morris brand instead of the  
4 competitors and that's an increase.

5 Q About 51 percent?

6 A That's correct.

7 Q And we talked a little bit -- and that's,  
8 of course, smoking rates for the whole country?

9 A That's correct.

10 Q For all cigarettes Philip Morris and  
11 otherwise, right?

12 A Yes.

13 Q Let's talk about Merit just a little bit  
14 more.

15 MR. DUMAS: No. 17, counsel.

16 BY MR. DUMAS:

17 Q Did you prepare a demonstrative that would  
18 show how Merit cigarettes have generally done with  
19 regard to market share?

20 A Yes.

21 MR. DUMAS: Okay. Counsel?

22 MR. TAUMAN: No objection.

23

24

25



1 BY MR. DUMAS:

2 Q Tell us what this shows, Ms. Lund.

3 A This does show Merit's market shares since  
4 it was introduced and the percentages on the side are  
5 the market share numbers. So at Merit's highest  
6 point, about four-and-a-half percent of the adult  
7 smokers in America chose Merit cigarettes. And  
8 needless to say, it has been declining since about  
9 1982, '81, '82.

10 Q And this market share right now, what is  
11 it, a little under two percent?

12 A It's under two percent, yes.

13 Q Is that for all three of the line  
14 extensions of Merit?

15 A Yes.

16 Q And to give us just a little more of a  
17 point of reference, I guess that is 2000 the last year  
18 there, or close to it?

19 A Close enough.

20 Q 1999, maybe?

21 A Yes.

22 Q The entire Merit line is about 1.8 percent  
23 or something?

24 A That's correct.

25 Q What is Marlboro?

1 A Marlboro in 1999 was about 38 percent.

2 Q So in terms of the size of the brand of  
3 Merit, is Merit a big brand, a medium size brand or a  
4 small brand?

5 A I would say a small brand.

6 Q I want to talk a little bit about youth  
7 smoking, okay?

8 A Okay.

9 Q Since you have been with Philip Morris,  
10 based on your personal observations, your personal  
11 experience, your personal knowledge, okay, has Philip  
12 Morris -- does Philip Morris target underage kids to  
13 start smoking with their advertising and marketing?

14 A No, we do not.

15 Q Are you sure about that?

16 A I am positive about that.

17 Q Can you recall ever being in a meeting, a  
18 marketing meeting at Philip Morris, where the brand  
19 managers or anyone else, account managers, vice  
20 presidents, whoever, presidents, where someone at  
21 Philip Morris said, "Here is what we need to do to get  
22 a bigger slice of the 16-year old smoking market"?

23 A No one has ever said that in my presence  
24 at Philip Morris.

25 Q Why doesn't Philip Morris target underaged

1 kids?

2 A I think it is really very simple. It is  
3 not legal for kids to smoke and it would be wrong for  
4 us to market to kids.

5 Q While you've been at Philip Morris, have  
6 you seen any marketing strategy proposed or presented  
7 to market to underage kids?

8 A I have not.

9 THE COURT: Counsel, how much longer with  
10 this witness?

11 MR. DUMAS: Oh, about another -- I would  
12 have to say another 45 minutes, Your Honor, maybe an  
13 hour at the outside.

14 THE COURT: All right. Let's take our  
15 afternoon break at this time, members of the jury.

16 (The following proceedings were held in  
17 open court, out of the presence of the jury at  
18 2:50 p.m.):

19 MR. DUMAS: Thank you, Your Honor.

20 MR. PHILLIPS: Your Honor, can we take up  
21 one thing before we go out of session?

22 THE COURT: All right. Court is back in  
23 session.

24 MR. TAUMAN: Can I ask you to revisit a  
25 ruling for clarification of a ruling? I know there

1 was some concern about whether this witness was  
2 either at Philip Morris or not at Philip Morris, or  
3 was reviewing documents or actually working with  
4 documents at the time.

5 And I think that was part of the inquiry,  
6 but the other inquiry is whether she is using her  
7 knowledge and experience, whether it is at Philip  
8 Morris or elsewhere in marketing, to express  
9 opinions about things that are happening even during  
10 the time she was at Philip Morris.

11 We don't doubt that she has the  
12 qualifications to do so. It's just under the  
13 rulings of the Court and procedures she is not  
14 allowed to do so. And there have been instances  
15 where whether it was couched there was now instances  
16 where she said, "It is my opinion that," or, "Do you  
17 have an opinion based on," you know, this or that.

18 But the fact is that when she says things  
19 like -- When this witness says things like, "Philip  
20 Morris would do this or should do this," this  
21 involves something that a layperson could not  
22 testify to, because they would not have the  
23 qualifications to do it.

24 She is giving historical facts. We have  
25 no complaints about that. And whether we like to

1 hear it or not, whether we think it is accurate or  
2 not, she is giving historical facts. But when she  
3 is giving the policy of Philip Morris, other than  
4 what is a written policy or when she is saying what  
5 Philip Morris would do when faced with a certain  
6 type of challenge, these are expressions of her  
7 opinion as a marketing expert.

8 And I hate to keep objecting, but I wanted  
9 to clarify with Your Honor so we didn't stand up and  
10 make fools of ourselves.

11 THE COURT: All right. The Court's ruling  
12 stands. Facts she can get into, but not opinions.

13 MR. DUMAS: Thank you, Your Honor.

14 THE COURT: All right. Court is out of  
15 session.

16 MR. DUMAS: 15 minutes.

17 THE COURT: At least 15 minute, maybe 20.  
18 All right.

19 (Court adjourned, Volume 371-B at 3:00 p.m.)

20 \* \* \*

21 (Court Reporter Charlotte A. Powers  
22 reported Volume 37-C.)  
23  
24  
25

## REPORTER'S CERTIFICATE

I, Katie Bradford, Official Reporter of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I reported in stenotype the oral proceedings had upon the hearing of the above-entitled cause before the HONORABLE ROOSEVELT ROBINSON, Circuit Judge, on March 4, 2002;

That I have subsequently caused my stenotype notes, so taken, to be reduced to computer-aided transcription under my direction; and that the foregoing transcript, Volume 37-B, Pages 1 through 133, both inclusive, constitutes a full, true and accurate record of said proceedings, so reported by me in stenotype as aforesaid.

A transcript without an original signature and red CSR seal is not certified.

Witness my hand and CSR Seal at Portland, Oregon, this 23rd day of August, 2002.

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Katie Bradford, CSR 90-0148  
Official Court Reporter

